(8)

No. 96-738-CFY
Status: GRANTED

Title: Mario Salinas, Petitioner
v.
United States

Docketed:
November 12, 1996

Court: United States Court of Appeals for the Fifth Circuit

Counsel for petitioner: Enriquez,Francisco J.

Counsel for respondent: Solicitor General, Goldstein,Gerald H.

Entry	Date	Note	Proceedings and Orders
1	Nov 12 1996	G	Petition for writ of certiorari filed. (Response due January 13, 1997)
3	Dec 5 1996		Order extending time to file response to petition until January 13, 1997.
4	Jan 13 1997		Brief of respondent United States in opposition filed.
5	Jan 29 1997		DISTRIBUTED. February 14, 1997 (Page 38)
7	Feb 18 1997		REDISTRIBUTED. February 21, 1997 (Page 13)
8	Feb 24 1997		Petition GRANTED. Limited to Questions 2 and 3 presented by the petition. SET FOR ARGUMENT October 8, 1997. **********
9	Apr 7 1997		Joint appendix filed.
10	Apr 7 1997		Brief of petitioner Mario Salinas filed.
12	Apr 9 1997		Brief of respondent Brigido Marmolejo, Jr. in support of petition filed.
11	Apr 10 1997		Brief amicus curiae of National Association of Criminal Defense Lawyers filed.
13	May 12 1997		Brief of respondent United States filed.
14	Jul 28 1997		CIRCULATED.
16	Aug 29 1997		Record filed.
		*	Partial record proceedings United States Court of Appeals for the Fifth Circuit.
15	Sep 5 1997		Record filed.
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No. _____

In The

Supreme Court of the United States

October Term, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. The Defendant, Mario Salinas, was a deputy sheriff employed by the Office of the Sheriff of Hidalgo County. Counts 3 and 4 of the indictment charged him with Federal Bribery violations under 18 U.S.C. Section 666. The case against him does not meet the prerequisites for such a federal prosecution. The facts do not bring it within the class of cases for which there can be a conviction under 18 U.S.C. Section 666 because the Sheriff's Office did not receive federal assistance during the relevant time periods as required by the statute. 18 U.S.C. Section 666(b). The question presented here is:

Are payments made by the federal government to the Sheriff's Office for the housing of federal prisoners in the county jail federal assistance or simply payments in return for services rendered?

II. The case against Salinas does not meet the prerequisites for a federal prosecution under 18 U.S.C. Section 666 the Federal Bribery Statute because no federal funds were in any manner impinged upon. The case involved bribery from a prisoner in return for contact visits. It had nothing whatsoever to do with the disbursement of or impingement upon federal, or even state or local, funds. The question presented here is:

What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute 18 U.S.C. Section 666? Do such cases include cases where no federal funds are disbursed or impinged?

QUESTIONS PRESENTED – Continued

III. Counts 1 and 2 of the indictment cover RICO substantive and RICO conspiracy respectively. The RICO substantive statute requires that the government prove two predicate acts before a defendant can be found guilty. Salinas was found not guilty of Count 1 (RICO substantive). Salinas contends that before he could be found guilty of RICO conspiracy the government must have proven that Salinas personally committed or agreed to commit two RICO predicate acts.

The trial court did not charge the jury in this manner and, in fact, required no acts on Salinas' part. The question presented here is:

Before a defendant can be found guilty of the Conspiracy provisions of the RICO statute, must the government prove that he personally committed or agreed to commit two RICO predicate acts?

IV. The law on this issue, prior to the opinion by the Fifth Circuit in this case, was such that before Salinas could be found guilty of RICO conspiracy the government must have proven that Salinas personally committed or agreed to commit two RICO predicate acts. The Fifth Circuit opinion changed the law so as to not require any predicate acts. The question presented here is:

Are a Defendant's due process rights violated when there is such a basic change in the law on criminal responsibility?

V. There were two search warrants issued searching for a specific item, i.e. two RADO watches. One search

QUESTIONS PRESENTED – Continued

warrant was issued for Salinas' home, the other for his office. The RADO watches were found in his home. The law requires that a search warrant be supported by probable cause that the evidence will be found in a particular place. There was none in this case. This is a classic fishing expedition. The question presented here is:

Is the Fourth Amendment requirement of probable cause violated when there is no information in the search warrant that would indicate that an item of evidence can be found in a particular place?

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PETITION FOR WRIT OF CERTIORARI

Mario Salinas respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on July 17, 1996, in order to resolve the conflicts between the Fifth, First, Second, Third and Tenth Courts of Appeals on the important issues presented herein, to resolve conflicts between the Fifth Circuit and Supreme Court and to resolve Constitutional issues based on the Fourth and Fifth Amendments, to the United States Constitution.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit that gives rise to this petition is published. App. 1. By order filed August 15, 1996, the Fifth Circuit denied the petition for rehearing and suggestion for rehearing en banc. App. 2.

JURISDICTION

The district court imposed sentence on Salinas on November 23, 1994. Salinas timely appealed to the Fifth Circuit, which affirmed in an opinion filed on July 17, 1996. On August 15, 1996, the Fifth Circuit denied Salinas timely-filed motion for rehearing and suggestion for rehearing en banc. Pursuant to Supreme Court Rule 13.1, this petition has been filed within 90 days of the denial of rehearing.

The jurisdiction of the court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

Fourth and Fifth Amendments to the U.S. Constitution

18 U.S.C. Section 666

18 U.S.C. Section 1961

18 U.S.C. Section 1962

18 U.S.C. Section 4002

(See App. 3 for text of statutes)

STATEMENT OF THE CASE

On or about June 1991 Homero Beltran, a federal prisoner, was placed in the Hidalgo County Jail, Hidalgo County, Texas, by the U.S. Marshall's office. He remained there until approximately March or April of 1992 at which time he was moved to other institutions eventually being placed in a federal penitentiary. During this first stay he pled guilty in January 1992 to a number of federal drug violations. On or about November of 1992 Beltran was returned again at the Marshall's direction to the Hidalgo County Jail. He was kept there pending a case against an associate of his against whom he was supposed to have testified. His stay this time ended in April 1993.

He has claimed that during this time he and his brother-in-law Juan Antonio Guardado paid numerous bribes to Brigido Marmolejo, Sheriff of Hidalgo County in return for the Sheriff arranging and allowing contact and conjugal visits. According to Beltran most of these visits took place in the Sheriff's personal office.

Defendant Mario Salinas at all times important to this prosecution was a deputy sheriff and held the title of a Chief Deputy. He was assigned the duties of managing the jail in Hidalgo County, its employees and prisoners. The hierarchy of the Sheriff's Department shows the Sheriff as the head, with Deputy Bob Davis immediately below the Sheriff. Reporting to Bob Davis and the Sheriff, the next level is the "Chief Deputies". Below the Chief Deputies were Captains and Lieutenants, and so forth.

The testimony showed that the persons entitled to grant contact visits were the Sheriff, Bob Davis, the Chiefs, the Captains and in some instances the Lieutenants. Contact visits are visits where the prisoner actually has physical contact with the visitor.

Defendant Salinas was indicted for allegedly participating in this bribe scheme in return for contact visits for the prisoner Homero Beltran. The original indictment included allegations of bribery involving another prisoner, but those charges were dismissed by the Government upon resting its case.

REASONS FOR GRANTING THE WRIT

I. The Fifth Circuit's Opinion Directly Conflicts With The Supreme Court's Opinion In *Logue* Which Establishes The Commercial Nature Of The Relationship Between The Sheriff's Office And The United States Government.

Before an individual can be found liable under Section 666, the Government is required to prove that the organization the individual worked for received federal assistance during the relevant time period. 18 U.S.C. Section 666 (b).

The Government has sought to base the applicability of Section 666 on an alleged contract for services between the Hidalgo County Sheriff's Office and the United States Marshall's Service. It relied on a contract between the Sheriff's Office for the housing of Federal Prisoners and payments made thereunder. App. 4.

No Federal program and no Federal assistance is involved.

This contract is made pursuant to 18 U.S.C. Section 4002 entitled "Federal Prisoners in State Institutions; Employment." However, the Supreme Court of the United States has firmly established the nature of the relationship created by such contracts. *Logue v. United States*, 412 U.S. 521 (1973).

> Though petitioners do not always distinguish between their two theories, they appear to contend alternatively that the Nueces County jail is a "Federal agency" by reason of its contract for the care of federal prisoners, or that the employees of the jail are "acting on behalf of"

> the Bureau of Prisons or the Government in performing services for federal prisoners. The Court of Appeals rejected these contentions, and we believe that it was right in doing so.

Id. at 526. The role of the Sheriff's Office in this case was defined as that of an independent contractor.

> Thus, Congress not only authorized the Government to make contracts such as the one here in question, but rather clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor, with the Government's role limited to the payment of sufficiently high rates to induce the contractor to do a good job.

Id. at 529.

Obviously, there is no federal assistance here. This issue has also been foreclosed against the Government by the legislative history of Section 666. *United States v. Stewart*, 727 F. Supp. 1068, 1072 (N.D. Tex. 1989).

At trial, the Government's witness on these matters testified unequivocally that the payments made were contract payments for services rendered and that they were not grant money, federal assistance or anything of that nature. App. 5.

In summary, the contract funds the Government rely on do not give rise to a Federal Crime under Section 666.

II. The Fifth Circuit's Opinion Directly Conflicts With The Second Circuit Decision In *Foley* And The Third Circuit Decision In *Cicco* Which Indicate That The Type Of Actions Prosecuted In Salinas Do Not Fall Under The Federal Bribery Statute.

The Government complains of the alleged contact visits given, supposedly in return for consideration received by the defendants. The statute makes it an offense for someone to corruptly solicit or demand, or accept, or agree to accept, anything of value from any person with intent to be influenced or rewarded in connection with any "business, transaction, or series of transactions . . . involving value of $5,000.00 or more." 18 U.S.C. Section 666 (a) (1) (B).

However, this case does not involve any granting of contracts in return for kickbacks, accepting of bids, embezzling of government money, theft of government property, granting of leases in return for payoffs, or anything of that nature. The statute simply does not apply.

In the case of *United States v. Cicco*, 938 F. 2d 441 (3rd Cir. 1991), the defendants were charged under Section 666 for alleged corrupt solicitation of political services and loyalty in exchange for municipal jobs.

The court reviewed in depth the legislative history of the statute and the case law interpreting it. The court held, "It is thus apparent that the crimes Congress targeted when it created Section 666 are simply different in kind than those alleged in the case at bar." *Id.* at 445. The court found that the conduct upon which the indictment was based was simply not a "transaction of a local government" and that Section 666 was ambiguous. *Id.* at 444.

In the case presently before this Court the Government has not alleged and cannot show any transactions of the nature proscribed by the statute.

Additionally, "The Senate Report specifically states that the new statute, section 666, was intended to . . . 'protect the integrity of the vast sums of money distributed through federal programs from . . . undue influence by bribery. . . . ' The emphasis was on protecting federal funds." *United States v. Wyncoop*, 11 F. 3d 119, 122 (9th Cir. 1993). No federal funds were in any manner impinged upon, nor was any proof submitted on this issue.

Finally, as noted in *United States v. Foley*, 73 F. 3d 484, 493 (2d Cir. 1996), if the act has "affected neither the financial interests of the protected organization nor federal funds directly" there is no violation.

III. The Fifth Circuit's Opinion On The Issue Of RICO Conspiracy Elements Is Directly In Conflict With The First Circuit Decision In *Carrozza*, The Second Circuit Decision In *Ruggiero* And The Tenth Circuit Decision In *Sanders*.

The Court's instructions to the jury allowed a finding of guilt to conspiracy without the necessity of the jury finding that this defendant either actually committed two or more of the alleged racketeering acts or that he agreed personally to perform two or more of the specific acts. The defendant, to be found guilty of RICO conspiracy, must have committed or have agreed to commit at least two separate crimes in furtherance of the conspiracy. *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965 (1982); *United*

States v. Elliot, 571 F. 2d 880, 902 (5th Cir. 1978); *United States v. Carrozza*, 4 F. 3d 70, 79 n.8 (1st Cir. 1993), cert. denied, 114 S.Ct. 1644 (1994); *United States v. Ruggiero*, 726 F. 2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *United States v. Sanders*, 929 F. 2d 1466, 1473 (10th Cir.), cert. denied, 502 U.S. 846 (1991). *See also, United States v. Marcello*, 876 F. 2d 1147, 1153 (5th Cir. 1989) (two predicate acts required to sustain a RICO Conspiracy); *United States v. Faulkner*, 17 F. 3d 745, 773 (5th Cir. 1994) ("We need not resolve this issue").

The conspiracy case against Salinas was tried by the government under these theories.

Despite this the Court instructed the jury that Defendant Salinas could be found guilty of RICO conspiracy even if he was not involved in any predicate acts. App. 6. This was error.

Apparently it was the intent of the trial court to either test the Fifth Circuit's prior rulings on this matter or to bring about a change in the law to conform to what it believed to be the law of some other circuits.

> The Court: And there's this problem that there's some old Fifth Circuit cases that arguably mean something else.
>
> Now, the Eleventh Circuit, supposedly has now said that the fifth circuit probably never meant that and wouldn't mean it today. That case you all gave me a month ago says, 'well, we don't need to reach that', but I'm just saying that even if I get reversed on it, at least we'll get the law cleared up.

App. 7.

Even under other circuits' standard the Salinas conspiracy count would still have been charged in the manner required. For example, an Eleventh Circuit case which discusses this issue in depth and with extended analysis is *United States v. Carter*, 721 F. 2d 1514 (11th Cir. 1984). Yet, the holding in that case would mandate a submission of the kind requested.

> In summary, we hold that where the government's evidence establishes that a defendant agreed to participate in a conspiracy with a single objective, the requisite pattern of racketeering necessary to the objective of a RICO conspiracy is lacking. Only by demonstrating that the defendant agreed to personally commit two or more predicate acts is this lack cured. In a case of this type, the trial court must instruct the jury that an essential element of a RICO conspiracy charge is an agreement to participate in the enterprises's affairs by personally committing, or agreeing to personally commit, two or more predicate acts.

Id. at 1531. Eventually, the Salinas case was submitted on one prisoner, involving one bribe scheme – that is, one objective. The trial court recognized this when it stated, "I mean, granted, it's one arrangement. . . . " App. 8. Therefore, even under an Eleventh Circuit analysis the RICO conspiracy counts would have been submitted in a manner which required the jury to find that Salinas had agreed to personally perform two or more predicate acts.

This issue is worthy of Supreme Court consideration because the Fifth Circuit panel decision makes a fundamental change in conspiracy law as it applies to RICO. The panel opinion *at best* views the prior Fifth Circuit case law on this point as vague and obfuscating. The conflict is something trial courts must deal with, and do grapple with. The conflict creates great uncertainty as to what a court must instruct a jury and how a defendant must defend himself and what kind of actions constitute criminal violations.

IV. The Trial Court's Instruction To The Jury On RICO Conspiracy And The Fifth Circuit's Opinion On The Issue Of RICO Elements Changes Prior Law On The Subject And, Consequentiy, Denied Salinas Constitutional Right To A Fair Trial And Due Process.

As noted above, it was the intent of the trial court to either test the Fifth Circuit's prior rulings on this matter or to bring about a change in the law to conform to what it believed to be the law of some other circuits.

> The Court: And there's this problem that there's some old Fifth Circuit cases that arguably mean something else.
>
> Now, the Eleventh Circuit, supposedly has now said that the fifth circuit probably never meant that and wouldn't mean it today. That case you all gave me a month ago says, 'well, we don't need to reach that', but I'm just saying that even if I get reversed

> on it, at least we'll get the law cleared up.

App. 7.

Where there is doubt as to whether a conviction is predicated on an impermissible ground the conviction should be vacated. *See Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931). Also, the rule of lenity would apply in this case and require a dismissal. *United States v. Hartec Enterprises, Inc.*, 967 F. 2d 130, 133 (5th Cir. 1992). It also appears that due process considerations would prohibit a change in the law applying retroactively to this case and this defendant. Fifth Amendment to the Constitution.

Where standards are applied retroactively to the potential detriment of a defendant in a criminal case the Due Process Clause is implicated and a conviction based on such standards will be reversed. *Marks v. United States*, 430 U.S. 188, 196, 97 S.Ct. 990, 995, 51 L.Ed. 2d 260 (1977). In that case, the various circuit courts of appeal applied the new standards in differing ways. Some applied the standards retroactively, some did not. 430 U.S. at 189 n. 1. The Court stated that although the Ex Post Facto Clause of the U.S. Constitution did not apply directly to the judicial branch, the principles it enunciates apply by virtue of the Fifth Amendment. 430 U.S. at 191 and 192. "[T]he notion that persons have a right to fair warning of that conduct which will give rise to criminal penalties – is fundamental to our concept of constitutional liberty." 430 U.S. at 191.

The conspiracy case against Salinas was tried by the government under the belief that the law required the

government to prove in a RICO conspiracy that the defendant personally committed or agreed to commit two or more of the alleged predicate acts.

> Mr. Surovic: Your honor, my understanding of the racketeering conspiracy case-law is that cases have been overturned when it was unclear from the record which particular racketeering acts, especially if they were less than . . . you know, less than two racketeering acts, were identified with each individual. Each individual has to be identified with at least two specific racketeering acts.

App. 9.

The wider net established in the present Salinas case should not apply. The panel opinion *at best* views the prior Fifth Circuit case law on this point as vague and obfuscating. The case was tried under a theory which would require a jury to find two predicate acts. It would seem that a defendant, under these circumstances, is not adequately placed on notice on what he must defend against and how he must defend himself.

V. The Search Warrant Lacked Probable Cause Because It Was A Classic Fishing Expedition And, Consequently, Violated Salinas' Constitutional Protection Against Unreasonable Search and Seizure.

A warrant is supported by probable cause if "given all the circumstances set forth in the Affidavit, there is a fair probability that contraband or evidence of a crime

will be found *in a particular place." United States v. McKeever*, 5 F. 3d 863, 865 (5th Cir. 1993) (emphasis added); *see Illinois v. Gates*, 462 U.S. 213, 239 (1983). As to the watches, there is no indication in the search warrant affidavit as to where the watches might be located. This is a classic fishing expedition. In fact, *both* the Salinas warrants, the one for the office *and* the one for his home, list the watches. It is obvious the Government had no information *where* the watches might be located and, instead, they went on a hopeful fishing expedition. App. 10. It had no information that the watches would be found in a particular place. Therefore, there was an unlawful search and seizure. No nexus was shown. *See United States v. Garcia*, 27 F. 3d 1009 (5th Cir.), cert. denied sub nom., *Chavez v. United States*, 115 S.Ct. 531, 130 L.Ed. 2d 435 (1994); *United States v. Laury*, 985 F. 2d 1293 (5th Cir. 1993).

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX 1

UNITED STATES of America,
Plaintiff-Appellee,

v.

Brigido MARMOLEJO, Jr. and Mario Salinas, Defendants-Appellants.

No. 94-60812.

United States Court of Appeals,
Fifth Circuit.

July 17, 1996.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY, WIENER and EMILIO M. GARZA, Circuit Judges.

EMILIO M. GARZA, Circuit Judge:

Brigido Marmolejo, Jr. and Mario Salinas, the former Sheriff and Chief Deputy Sheriff of Hidalgo County, Texas were convicted of various offenses arising from a series of bribes that Marmolejo received, and Salinas aided and abetted, in exchange for permitting conjugal visits for a federal prisoner housed at the Hidalgo County Jail. Marmolejo appeals his conviction and his sentence. Salinas appeals only his conviction. We affirm both defendants' convictions and Marmolejo's sentence.

I

While Marmolejo was the Sheriff of Hidalgo County, Texas, Homero Beltran-Aguirre (Beltran) was a federal prisoner housed at the Hidalgo County Jail pursuant to an agreement between the United States Marshals Service and Hidalgo County.[1] As Sheriff of Hidalgo County, Marmolejo was in charge of the operation of the Hidalgo County Jail. Salinas was Marmolejo's immediate subordinate as the Divisional Chief for Detention of the Hidalgo County Sheriff's Office.

Beltran was housed at the Hidalgo County Jail on two separate occasions: first, from June 7, 1991 to April 14, 1992, and second, from November 6, 1992 to April 26, 1993. The series of bribes comprising the pattern of racketeering charged in the indictment against Marmolejo and Salinas occurred during these periods.

As a result of the bribery scheme between Marmolejo and Beltran, Marmolejo and Salinas were convicted of numerous offenses. A jury found Marmolejo guilty of violating RICO, in violation of 18 U.S.C. § 1962(c), RICO conspiracy, in violation of 18 U.S.C. § 1962(d), two counts of bribery in relation to a program receiving more than $10,000 in federal funds, in violation of 18 U.S.C. § 666(a)(1)(B) and 18 U.S.C. § 2, aiding and abetting money laundering, in violation of 18 U.S.C. § 1956(a)(1)(B)(i) and 18 U.S.C. § 2, two counts of money laundering, in violation of 18 U.S.C. § 1956(a)(1)(A)(i), and travel in interstate commerce to promote bribery, in violation of 18 U.S.C. § 1952(a)(3). A jury found Salinas

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[1] This agreement is described in detail in Part II *infra*.

guilty of RICO conspiracy, in violation of 18 U.S.C. § 1962(d), and two counts of bribery in relation to a program receiving more than $10,000 in federal funds, in violation of 18 U.S.C. § 666(a)(1)(B) and 18 U.S.C. § 2. Both defendants filed timely appeals.

II

Marmolejo and Salinas argue several points of error concerning their convictions for bribery under 18 U.S.C. § 666(a)(1)(B), which prohibits theft and bribery by officials of state and local agencies that receive federal funds.[2] We review questions of statutory interpretation *de novo*. *United States v. Westmoreland*, 841 F.2d 572, 576 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988). "Courts in applying criminal laws generally must

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[2] Section 666 applies to an "organization, government, or agency [that] receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b).

The section under which the defendants were convicted punishes anyone who:

> (a)(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –
>
> > (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more. . . .

18 U.S.C. § 666(a)(1)(B).

follow the plain and unambiguous meaning of the statutory language. '[O]nly the most extraordinary showing of contrary intentions' in the legislative history will justify departure from that language." *United States v. Albertini*, 472 U.S. 675, 680, 105 S.Ct. 2897, 2902, 86 L.Ed.2d 536 (1985) (citations omitted) (quoting *Garcia v. United States*, 469 U.S. 70, 75, 105 S.Ct. 479, 482, 83 L.Ed.2d 472 (1984)).

A

Section 666(b) restricts the statute to agencies that receive "in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance or other form of Federal assistance." 18 U.S.C. § 666(b). The defendants contend that the district court did not have jurisdiction to try the bribery counts under 18 U.S.C. § 666 because Hidalgo County did not receive "benefits in excess of $10,000 under a Federal program" or any "other form of Federal assistance." *Id.*

The parties dispute whether it is proper, in determining whether Hidalgo County Jail received Federal assistance, to focus on (1) a Cooperative Agreement Plan (CAP), which provided a $850,000 grant for construction at the Hidalgo County Jail, *and* an Intergovernmental Service Agreement (IGA), which provided that Hidalgo County Jail would house federal prisoners in exchange for their costs, or (2) just IGA.[3] This issue is relevant not

[3] The government contends that CAP and IGA together constituted a Federal program under § 666(b). The defendants argue that the construction grant issued pursuant to CAP is irrelevant to an analysis of what, if any, Federal assistance the Hidalgo County Jail received while Beltran was in the jail. They argue that because CAP was entered into and completed in 1984 and the bribery scheme occurred between 1991 and 1993, CAP could not qualify as Federal assistance received in a one year period before or after the date of the commission of the offense. *See* 18 U.S.C. §§ 666(b) and 666(d)(5). The defendants argue further that IGA does not qualify as "Federal assistance" or a "Federal program" because it was simply a contract for services rendered, and thus a commercial transaction exempted from the statute by §§ 666(b) and (c).

only to determine whether the arrangement constituted a Federal program or Federal assistance, but also to determine whether Hidalgo County satisfies the requirement that it received the benefit within a one year period.[4]

The plain language of § 666(b) is ambiguous in defining "Federal program" and "Federal assistance." Although it is clear that the assistance can consist of a

[4] Section 666(d)(5) defines a one-year period as "a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense." Because Hidalgo County received the $850,000 construction grant in 1984, and because the offenses committed in this case occurred from June 1991 to April 1992 and from November 1992 to July 1993, and assuming that only CAP is a Federal program under § 666(b), Hidalgo County would not have received the required amount of benefit within the relevant one-year period. However, if IGA and CAP should be viewed collectively as one agreement, and the agreement constitutes a Federal program, then the one-year requirement would be met, because Hidalgo County received approximately $840,000 per year pursuant to IGA for housing federal prisoners *at cost* per CAP during the time that Beltran was housed at the jail.

grant, contract, subsidy, loan, guarantee, or insurance, the other defining qualities of "Federal assistance" are still unclear. The legislative history, however, provides that the term "Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance" should be construed broadly. S.Rep. No. 225, 98th Cong., 2d Sess. 370 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182, 3511 [hereinafter S.Rep. No. 225]. We must determine, therefore, whether under a broad interpretation of "Federal assistance," it is proper to analyze IGA and CAP collectively as a single agreement because they are so interrelated.

IGA and CAP were entered into in 1984 to establish and govern relations between the U.S. Marshals Service and Hidalgo County. CAP was the first agreement; it provided for "Federal participation in the funding of local governmental jail construction, renovation or improvement programs" and was "predicated upon the Federal government's requirement for detention space and services and the local government's provision of such services." As a condition to the receipt of this grant, Hidalgo County Jail had to guarantee that it would provide detention space for federal prisoners. The second agreement, IGA, established the actual formal relationship between the U.S. Marshals Service and other federal user agencies and Hidalgo County for the detention of federal prisoners. Although Hidalgo County had already guaranteed that it would provide such space, IGA established the specific provisions and requirements of the agreement including the compensation that Hidalgo County would receive.

These agreements are so interrelated that they must be viewed collectively as one agreement, especially given the fact that the grant issued pursuant to CAP was conditioned on the agreement in IGA. Having reviewed the nature and purposes of CAP and IGA, we conclude that together they constituted "Federal assistance" or a "Federal program" under 18 U.S.C. § 666(b), consisting of a grant, CAP, and a contract, IGA. Our holding is supported by the broad construction of § 666(b) mandated in the legislative history. S.Rep. No. 225 at 3511.

Focusing exclusively on IGA, the defendants argue that the arrangement between Hidalgo County and the U.S. Marshals Service was a commercial transaction. In urging that this is a commercial transaction, the defendants emphasize the fact that the U.S. Marshals Service received something in return for the funds it provided to Hidalgo County.[5]

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[5] The defendants appear to argue that as a "commercial transaction," this arrangement would be excluded from the statute by §§ 666(b) and (c). However, § 666(c), which excludes "bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business," refers to the alleged wrongdoing, to ensure that the statute is not applied to "acceptable commercial and business practices," H.R.Rep. No. 797, 99th Cong., 2d Sess. 30, *reprinted in* 1986 U.S.C.C.A.N. 6138, 6153, not to the nature of the benefit that the agency receives pursuant to the Federal program. *See United States v. Valentine*, 63 F.3d 459, 465 (6th Cir.1995) (declining to hold that the use of employees for personal benefit is in the usual course of business); *United States v. Grubb*, 11 F.3d 426 (4th Cir.1993) (declining to hold that salary obtained in exchange for $10,000 bribe was "bona fide"). *But see United States v. Nichols*, 40 F.3d 999, 1000 (9th Cir.1994) (applying § 666(c) to the nature of the Federal assistance). Certainly the defendants are not

The legislative history again demonstrates why the defendants' argument must fail. The Senate Report states that the goal in enacting 18 U.S.C. § 666 was to protect the integrity of federal funds by punishing theft and bribery involving Federal programs for which there is "a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." S.Rep. No. 225 at 3511. Focusing on this legislative history, the Second Circuit in *United States v. Rooney*, 986 F.2d 31, 35 (2d Cir.1993), rejected a *quid pro quo* argument similar to that argued by Marmolejo and Salinas. The *Rooney* court stated that the proper focus in determining whether federal funds constitute "Federal assistance" under § 666(b) is "whether the funds disbursed can be considered Federal assistance within a specific statutory scheme intended to promote public policy objectives and not payments by the government as a commercial entity." *Rooney*, 986 F.2d at 35. Finding that the statute equated "benefit" with "Federal assistance," the Second Circuit held that an Farmers Home Administration loan could constitute Federal assistance under § 666(b), despite the fact that the defendant was obligated to repay the loan plus interest, because the money the defendant received was authorized by a specific statute to accomplish specific policy goals established by Congress. *Id.* at 34-35.

Likewise, in this case, the funds that the federal government provided for Hidalgo County were authorized by a specific statute and were intended to further

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arguing that the money they received from Beltran or the benefit that Beltran received from them was "bona fide" and "in the usual course of business." 18 U.S.C. § 666(c).

public policy goals. The fact that Hidalgo County housed federal prisoners in return for the money it received from the United States Marshals Service does not preclude the arrangement from being a Federal program under § 666(b). The federal funds were authorized by 18 U.S.C. § 4002 to fulfill the federal government's policy of providing "suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress," 18 U.S.C. § 4002, and as stated in CAP, to provide for "[f]ederal participation in the funding of local governmental jail construction, renovation or improvement programs." Therefore the combination of CAP and IGA qualifies as a Federal program under § 666(b), regardless of the fact that the government received something in return for the assistance it provided to Hidalgo County.[6]

B

The defendants next argue that they were "improperly prosecuted" under 18 U.S.C. § 666(a)(1)(B). They argue that in enacting 18 U.S.C. § 666, Congress did not intend to reach their behavior. Specifically, they contend that there was not a business, transaction, or series of transactions "involving anything of value of $5,000 or more," as required under § 666(a)(1)(B).

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[6] Because we hold that IGA and CAP together constitute a Federal program, Hidalgo County meets the one-year requirement as defined in 18 U.S.C. 666(d)(5), because it received $840,000 a year for housing federal prisoners during the period in which the offenses were committed.

Section 666(a)(1)(B) requires the government to prove that agents of a local government solicited, demanded, accepted, or agreed to accept anything of value from any person intending to be influenced "in connection with any business, transaction, or series of transactions of such government . . . involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B). The evidence at trial demonstrated that Beltran was housed at the Hidalgo County Jail, pursuant to an IGA. After observing that several of the federal prisoners were receiving special treatment at the jail, Beltran entered into an agreement with Marmolejo to receive special treatment in exchange for monetary consideration. Specifically, Marmolejo allowed Beltran to have conjugal visits with his wife and girlfriend in exchange for $6,000 a month and $1,000 per visit. These visits took place in the jail library and eventually in Sheriff Marmolejo's office.

The evidence also disclosed that Marmolejo told Beltran's brother-in-law, Guardado, who often arranged the visits, that if Marmolejo was not available, he could contact Salinas about arranging a visit. Marmolejo usually guarded his office door when Beltran and his wife or girlfriend were visiting. However, Salinas supervised the visits on several occasions. The evidence also established that Beltran instructed Guardado to purchase four sets of men and women's Rado watches, one set of which was given to Salinas and one set to Marmolejo. Both Salinas and Marmolejo also received cars from Beltran. Marmolejo was also involved in numerous financial transactions with Beltran.

We have previously held that § 666(a)(1)(B) does not require the government to prove that federal funds were

directly involved in a bribery transaction, or that the federal monies funded the corrupt transaction. *Westmoreland*, 841 F.2d at 578 (upholding conviction of a county supervisor under § 666(a)(1)(B) for taking bribes in connection with the granting of contracts for the maintenance of local roads and bridges although the funds corruptly disbursed were not federal funds). Therefore, although the government did not have to trace any federal funds to the illegal transaction between Beltran and Marmolejo and Salinas, we must consider whether the term "anything of value" in § 666(a)(1)(B) was intended to cover transactions involving intangibles, such as a conjugal visit, that are difficult to value.

We turn first to the plain language of the statute. The term *"anything* of value" in § 666(a)(1)(B) is broad in scope and contains no language restricting its application to transactions involving money, goods, or services. Similarly, the statute does not require that the organization, government, or agency or the person giving the agent the bribe, valued the transaction at $5,000 or more. We hold, therefore, that the plain meaning of the statute compels our conclusion that the term "anything of value" in § 666(a)(1)(B) includes transactions involving intangible items, such as the conjugal visits at issue in this case.[7]

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[7] We note that the dissent's belief that the relevant language of § 666(a)(1)(B) is ambiguous, directly contradicts our finding in *Westmoreland*, 841 F.2d at 576. In *Westmoreland*, we rejected the defendant's argument that "sufficient statutory ambiguity exists to invoke the rule of strict construction applicable to criminal statutes and the rule that congressional intent, as evidenced by the legislative history, controls," because we found the statutory language "plain and unambiguous." *Id.* at 575-76.

See United States v. Mongelli, 794 F.Supp. 529, 531 (S.D.N.Y.1992) (holding that term "anything of value" in 18 U.S.C. § 666(a)(1)(B) includes intangibles).

This broad language squares with Congress's intent in enacting 18 U.S.C. § 666 to safeguard "the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them." *Westmoreland*, 841 F.2d at 577, 578. The Senate Report stated that:

> [18 U.S.C. § 666 was] designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies that are disbursed to private organizations or State and local governments pursuant to a Federal program.

S.Rep. No. 225 at 3510. Specifically, the statute was intended to fill a gap in the then-current federal bribery and theft statutes caused by the difficulty of tracing federal monies.[8] To accomplish its goal, Congress "cast a

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[8] The Senate Report described the then-existing state of the law:

> [T]itle XI covers both theft and bribery type offenses. With respect to theft, 18 U.S.C. § 665 makes theft or embezzlement by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense. However, there is no statute of general applicability in this area, and thefts from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 U.S.C. § 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown. This situation gives rise to a serious gap in the law, since even though title to the monies may have passed, the Federal Government clearly retains a strong interest in assuring the integrity of such program funds. Indeed, a recurring problem in this area (as well as in the related area of bribery of the administrators of such funds) has been that State and local prosecutors are often unwilling to commit their limited resources to pursue such thefts, deeming the United States the principal party aggrieved.
>
> With respect to bribery, 18 U.S.C. 201 generally punishes corrupt payments to Federal public officials, but there is some doubt as to whether or under what circumstances persons not employed by the Federal Government may be considered as a "public official" under the definition in 18 U.S.C. 201(a). . . .

S.Rep. No. 225 at 3510.

broad net to encompass local officials who may administer federal funds, regardless of whether they actually do." *Id.* at 577.

We also note that other courts have interpreted the term "anything of value" in criminal statutes broadly to include intangibles. *See United States v. Nilsen*, 967 F.2d 539, 542 (11th Cir.1992) (stating that "Congress' frequent use of 'thing of value' in various criminal statutes has evolved the phrase into a term of art which the courts generally construe to envelope both tangibles and intangibles"), *cert. denied*, 507 U.S. 1034, 113 S.Ct. 1856, 123 L.Ed.2d 478 (1993); *United States v. Picquet*, 963 F.2d 54, 55 (5th Cir.) (holding that the term "anything of value" in 18 U.S.C. § 1029(a)(2) should be interpreted broadly), *cert.*

denied, 506 U.S. 902, 113 S.Ct. 290, 121 L.Ed.2d 215 (1992); *United States v. Girard*, 601 F.2d 69, 71 (2d Cir.) (holding that term "thing of value," when used in criminal statutes, such as in 18 U.S.C. § 641, includes intangibles, such as amusement, sexual intercourse, a promise to reinstate an employee, and information), *cert. denied*, 444 U.S. 871, 100 S.Ct. 148, 62 L.Ed.2d 96 (1979); *see also United States v. Williams*, 705 F.2d 603, 622-23 (2d Cir.) (holding that term "anything of value" in 18 U.S.C. § 201(c) and 18 U.S.C. § 201(g) can apply to stock that, although it had no actual value, the defendant expected it to have value), *cert. denied*, 464 U.S. 1007, 104 S.Ct. 524, 78 L.Ed.2d 708 (1983); *McDonald v. State*, 57 Ala.App. 529, 329 So.2d 583, 587-88 (1975) (holding that sexual intercourse or the promise of sexual intercourse is a "thing of value" under state bribery statute), *cert. denied*, 429 U.S. 834, 97 S.Ct. 99, 50 L.Ed.2d 99 (1976); *Scott v. State*, 107 Ohio St. 475, 141 N.E. 19, 22-23 (1923) (same).

Because the conduct in this case involves serious acts of bribery by agents of a local government who were carrying out their duties under a Federal program, we conclude that this case is within the scope of conduct Congress intended to encompass with 18 U.S.C. § 666.[9]

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[9] The defendants argue that even if their actions meet the literal definition of the statute, Congress did not intend to punish their type of behavior in enacting 18 U.S.C. § 666. Again, the legislative history supports our finding that this prosecution was proper. The Senate Report stated that Congress intended 18 U.S.C. § 666 to encompass behavior in three specific cases, each of which involved an organization or agency that provided the Federal government with a service by administering a government program, much like the Hidalgo County Jail did in this case. S.Rep. No. 225 at 3511 (citing *United States v. Hinton*, 683 F.2d 195 (7th Cir.1982) (involving head of a nonprofit corporation organized to administer federal funds from a HUD program who solicited money in exchange for housing rehabilitation contracts funded by HUD), *aff'd sub nom. Dixson v. United States*, 465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984); *United States v. Mosley*, 659 F.2d 812 (7th Cir.1981) (involving head of state administrator of funds from a CETA program who solicited money in exchange for preferential treatment under the program); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.) (involving bribery of city administrator of funds from HUD program), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975).

Defendants cite *United States v. Cicco*, 938 F.2d 441 (3d Cir.1991), as support for their argument that Congress did not intend to reach their behavior in enacting 18 U.S.C. § 666. The facts of *Cicco*, however, do not support their argument. In *Cicco*, the defendants were indicted for soliciting political support in exchange for the retention of municipal jobs. The Third Circuit reasoned that the legislative history revealed that Congress enacted § 666 to enlarge those covered by federal bribery laws, not "the sort of 'political patronage harassments' alleged" in that case. *Id.* at 446 (quoting S.Rep. No. 1245, 94th Cong., 2d Sess. 2, *reprinted in* 1976 U.S.C.C.A.N. 2883, 2884). Because the defendants' behavior in *Cicco* was covered by another criminal statute, 18 U.S.C. § 601, which was " 'directed at protecting federally-funded employment from partisan favoritism,' " the court concluded that Congress did not intend to encompass such behavior under § 666. *Id.* The *Cicco* court was persuaded in particular by the fact that if the conduct at issue was covered by § 666 as well as § 601, the punishment would have been ten times as severe under § 666, and without any mention of § 601 in the legislative history, the *Cicco* court was not prepared to conclude that Congress intended such a result. *Id.* Instead, the court believed "Congress intended § 666 to address different and more serious criminal activity" involving theft and bribery. *Id.*

As Sheriff and Chief Deputy Sheriff of Hidalgo County, the defendants were in charge of carrying out the Federal

program of housing and safekeeping the federal prisoners, including Beltran, at Hidalgo County Jail. Part of their responsibilities pursuant to IGA was to provide and regulate the prisoners' visitation rights. As agents of the Hidalgo County Jail, Marmolejo and Salinas accepted money, watches, and cars intending to be influenced in connection with transactions of the jail, namely, the issuance and regulation of prisoner visits with family and friends. The transactions involved something of value – conjugal visits that Beltran was willing to pay for.

We must now determine whether these conjugal visits had a value of $5,000 or more. Again, we observe that the statute does not contain language "to indicate that 'any transaction involving $5,000' means 'any federally funded transaction involving $5,000' or 'any transaction involving $5,000 of federal funds.'" *Westmoreland*, 841 F.2d at 576. "[A]ny reference to federal funds is conspicuously absent from the operative provisions," allowing Congress to ensure the integrity of federal funds by protecting the integrity of the organizations that receive them. *Id.* at 577-78. The statute does not specifically require that the payor or the payee of the bribe value the transaction at $5,000.[10] Instead, the $5,000 triggering provision ensures that the statute reaches acts of

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[10] *Compare Westmoreland*, 841 F.2d at 576-78 (stating that the unambiguous language of § 666(a)(1)(B) does not require the government to establish any relation between the transaction involving a "thing of value of $5,000" and the federal funds the agency receives) *with United States v. Foley*, 73 F.3d 484, 490 (2d Cir.1996) (stating that § 666(a)(1)(B) was enacted to permit prosecution for bribery in connection with federal program funds, therefore, in determining whether a transaction involves "anything of value of $5,000 or more," the "value must be

bribery involving transactions of substantial value. *Id.* at 578. To decide whether a transaction involving intangibles has a value of $5,000 or more, courts should look to traditional valuation methods. *See Mongelli*, 794 F.Supp. at 531. We conclude that the conjugal visits in this case did have a value which exceeded $5,000. We arrive at this estimate in the same way that an appraiser would value an asset – by looking at how much a person in the market

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connected, even if only indirectly, to the integrity of federal program funds"). The dissent claims that *Foley* holds that "the proper method to value a transaction is from the perspective of the protected entity." However, *Foley's* only statement about assessing the "thing's value" states that it must be connected to the integrity of the federal program funds. *Foley*, 73 F.3d at 490. *Foley* does intimate that if the transaction involved in that case had affected the financial interests of the protected local organization, then that case *might* have been properly prosecuted under § 666(a)(1)(B). *Id.* at 492-93. However, the only decisive language in *Foley* concerns the fact that the federal program funds were not affected, even indirectly, by the transaction. *Id.* at 490, 492 & 493. We note that the plaintiff in *Westmoreland* could not have been convicted under § 666(a)(1)(B) under the holding in *Foley*. *Foley* requires a connection between the transaction's value of $5,000 or more and the integrity of the federal program funds that the government receives. The *Foley* court stated that the legislative history indicated that § 666(a)(1)(B) was "not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds." *Foley*, 73 F.3d at 493. However, the plaintiff in *Westmoreland*, a county supervisor, was convicted of accepting bribes in exchange for effecting sales transactions worth $14,482.92. We upheld her conviction even though it was undisputed that the alleged acts of bribery concerned only state monies, not the federal funds that the county received. To the extent that the *Foley* court would have reversed her conviction under § 666(a)(1)(B), this case is in conflict with Fifth Circuit law.

would be willing to pay for them. *Id.*; *see also Herman v. United States*, 289 F.2d 362 (5th Cir.) (stating that to determine if the value of stolen property is $5,000 or more, as required in 18 U.S.C. § 2314, courts must look at "the price a willing buyer would pay a willing seller at the time and place the property was stolen"), *cert. denied*, 368 U.S. 897, 82 S.Ct. 174, 7 L.Ed.2d 93 (1961); *United States v. Seagraves*, 265 F.2d 876 (3d Cir.1959) (stating that amount defendants paid for stolen property can form basis for expert's valuation of the property under 18 U.S.C. § 2314). Pursuant to the bribery transactions, Beltran was willing to pay Marmolejo $6,000 a month plus $1,000 for each visit. Therefore, the transactions between Beltran and Marmolejo and Salinas involved something "of value of $5,000 or more." Accordingly, we conclude that Marmolejo and Salinas were properly prosecuted under 18 U.S.C. § 666(a)(1)(B).[11]

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[11] The defendants' final argument with respect to 18 U.S.C. § 666 is that the Sheriff's office is not an agent of a local government as required by § 666(a)(1). Section 666 applies to every "agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof." 18 U.S.C. § 666(a)(1). "Local" is defined as "of or pertaining to a political subdivision within a state." 18 U.S.C. § 666(d)(3). It is clear that this statute was intended to encompass all employees of all governmental agencies and their subdivisions. *See* 18 U.S.C. § 666(d)(2). The Hidalgo County Sheriff's office is an agency of Hidalgo County, and both defendants are agents of the Sheriff's office; therefore, they are covered by the statute.

Salinas also argues that there was insufficient evidence to convict him of aiding and abetting Marmolejo's violation of 18 U.S.C. § 666(a)(1)(B). After a careful review of the record, we conclude there was sufficient evidence to sustain the conviction.

III

At trial, the government alleged that the defendants violated TEX.PENAL CODE ANN. § 36.02(a)(1), which constituted "predicate acts establishing a pattern of racketeering activity" in violation of RICO.[12] *See* 18 U.S.C. § 1962(c). A state offense can only constitute a predicate act establishing a pattern of racketeering activity if the offense is punishable by more than one year in prison. 18 U.S.C. § 1961(1)(A). Salinas and Marmolejo allege that their prosecution under TEX.PENAL CODE ANN. § 36.02(a)(1) was improper because a more specific statute, TEX.PENAL CODE ANN. § 36.08(b), applies to their conduct.[13] They rely on a well-established rule of construction "that if two legal provisions apply, one general and one specific, the specific takes precedence." *United States v. Tunnell*, 667 F.2d 1182, 1185 (5th Cir.1982). While TEX.PENAL CODE ANN. § 36.02(a)(1) is a felony punishable by more than one year in prison, TEX.PENAL CODE ANN. § 36.08(b) is a misdemeanor which is not punishable by more than one year in prison. Therefore, if the defendants should have been

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[12] TEX.PENAL CODE ANN. § 36.02(a)(1) provides:

> A person commits an offense if he intentionally or knowingly offers, confers, or agrees to confer on another, or solicits, accepts, or agrees to accept from another any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant, party official, or voter.

[13] TEX.PENAL CODE ANN. § 36.08(b) provides that "[a] public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency."

prosecuted under § 36.08(b) instead of § 36.02(a)(1), they would not have committed predicate acts constituting racketeering activity in violation of RICO.

Having reviewed the evidence against the defendants, we hold that they were properly charged under TEX.PENAL CODE ANN. § 36.02(a)(1), which prohibits accepting bribes, rather than § 36.08(b), which prohibits accepting gifts. The appropriate inquiry is which statute criminalizes the defendants' conduct here. *See Tunnell*, 667 F.2d at 1185 (concluding that defendants were properly charged under the statute which criminalized their exact behavior). The evidence at trial demonstrated an elaborate system of bribes between Marmolejo and Beltran, aided and abetted by Salinas. The cash payments, watches, and other consideration that the defendants received were not gifts; they were given as payment for conjugal visits and other special favors. Thus the defendants were properly convicted under the more serious statute, § 36.02(a)(1), which prohibited the exact behavior which they engaged in – bribery. *See Id.* at 1185; *Cerda v. State*, 750 S.W.2d 925, 927 (Tex.App. – Corpus Christi 1988, pet. ref'd).[14]

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[14] The defendants also argue that the government failed to prove that they were "public servant[s]" within the meaning of the statute and that they acted in a discretionary manner in allowing conjugal visits. TEX.PENAL CODE ANN. § 1.07(a)(41)(A) defines public servant as one who is "elected, selected, appointed, employed, or otherwise designated as . . . an officer, employee, or agent of government." Marmolejo was elected Sheriff of Hidalgo County which is an agent of government; therefore, he satisfies this broad definition of public servant. Salinas also satisfies the definition because he was either selected or appointed as an employee of Hidalgo County.

TEX.PENAL CODE ANN. § 36.02(a)(1) punishes the receipt of benefits in exchange "for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant." The defendants argue that as jailers they act in a ministerial, not a discretionary manner. This argument is also without merit. Conjugal visits were not permitted under Hidalgo County Jail policy. They were allowed in this case, only as a result of Marmolejo's exercise of discretion, aided and abetted by Salinas, in exchange for money and other types of consideration.

The defendants also argue that the government failed to prove that Beltran was in "custody." TEX.PENAL CODE ANN. § 36.02(a)(1) does not require custody; therefore, this argument is also without merit.

IV

Salinas appeals the trial court's jury instruction on the RICO conspiracy count,[15] arguing that it erroneously allowed the jury to convict him without proof that he performed or agreed to perform personally two of the predicate acts which comprise the pattern of racketeering

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[15] Salinas was charged with violating a substantive RICO provision, 18 U.S.C. § 1962(c), and with conspiring to violate a substantive RICO provision, 18 U.S.C. § 1962(d). He was acquitted of the substantive count, but convicted on the conspiracy count. Section 1962(d) provides that it is unlawful "for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." 18 U.S.C. § 1962(d). Section 1962(c) prohibits "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt." 18 U.S.C. § 1962(c).

activity.[16] "While great latitude is shown the trial court in fashioning jury instructions, we will review [the instructions] to determine whether they accurately and completely state the law." *Banc One Capital Partners Corp. v. Kneipper*, 67 F.3d 1187, 1192 (5th Cir.1995).

Fifth Circuit cases have obfuscated the issue of whether each RICO conspirator must agree to commit personally two or more racketeering acts or whether it is sufficient that the conspirator simply agree that one of his co-conspirators will commit two or more racketeering acts.[17] This issue has divided the circuits, with the majority holding that a RICO conspirator need only agree "that members of the conspiracy will violate [a substantive RICO provision] through the commission of two proscribed acts," not that he will personally commit two

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[16] The trial court's instruction on the RICO conspiracy count stated:

> What you are being asked to decide in Count Two is . . . If Salinas was only involved in one or two or even none, did he, nevertheless, know about this pattern. Did he know that this whole pattern of activity was going on and did he then knowingly and willfully join in and participate and contribute in some fashion.

[17] Both the majority and the minority views on this issue ground their interpretation of § 1962(d) on *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978). "However, a reading of *Elliott* in conjunction with the later case of *United States v. Sutherland*, 656 F.2d 1181 (5th Cir.1981) reveals that the Fifth Circuit had not definitively resolved this issue." *United States v. Neapolitan*, 791 F.2d 489, 496 n. 3 (7th Cir.), *cert. denied*, 479 U.S. 940, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986).

proscribed acts.[18] *United States v. Neapolitan*, 791 F.2d 489, 494 (7th Cir.), *cert. denied*, 479 U.S. 940, 107 S.Ct. 422, 93 L.Ed.2d 372 (1986).

Our decision in *United States v. Elliott*, 571 F.2d 880 (5th Cir.), *cert. denied*, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 (1978), lays the groundwork for analyzing the present controversy. The issue in *Elliott* was whether the government can link together, under a RICO conspiracy charge, multiple conspiracies whose crimes may have no relation to each other except for their affiliation with a common criminal enterprise. *Id.* at 902-03. In answering this question affirmatively, we explained:

> the object of a RICO conspiracy is to violate a substantive RICO provision – here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity – and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of

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[18] The majority consists of the Sixth, Third, Ninth, Eleventh, and Seventh Circuits. *See United States v. Joseph*, 781 F.2d 549, 554 (6th Cir. 1986); *United States v. Adams*, 759 F.2d 1099, 1116 (3d Cir.), *cert. denied*, 474 U.S. 971, 106 S.Ct. 336, 88 L.Ed.2d 321 (1985); *United States v. Tille*, 729 F.2d 615, 619 (9th Cir.), *cert. denied*, 469 U.S. 845, 105 S.Ct. 156, 83 L.Ed.2d 93 (1984); *United States v. Carter*, 721 F.2d 1514, 1529 (11th Cir.), *cert. denied sub nom., Morris v. United States*, 469 U.S. 819, 105 S.Ct. 89, 83 L.Ed.2d 36 (1984); *Neapolitan*, 791 F.2d at 497. The First and Second Circuits currently compose the minority, holding that a RICO conspirator must personally agree to commit two predicate acts. *See United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom., Rabito v. United States*, 469 U.S. 831, 105 S.Ct. 118, 83 L.Ed.2d 60 (1984); *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir.1981), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1250, 75 L.Ed.2d 479 (1983).

> racketeering activity. . . . Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs.

Id. at 902. Our subsequent cases have made it clear that to prove a RICO conspiracy "no actual acts of racketeering need occur; there need only exist a conspiracy to perform the necessary acts plus some overt action by one of the conspirators in furtherance of the conspiracy." *United States v. Phillips*, 664 F.2d 971, 1038 (5th Cir.1981) (citing *United States v. Sutherland*, 656 F.2d 1181, 1187 n. 4 (5th Cir.1981), *cert. denied*, 455 U.S. 949, 102 S.Ct. 1451, 71 L.Ed.2d 663 (1982)), *cert. denied sub nom., Meinster v. United States*, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982). Yet, our cases have still not resolved what RICO conspirators must individually agree to.

Today we join the majority view among the circuits in holding that to be guilty of RICO conspiracy, the conspirator must simply agree "to the objective of a violation of RICO; he need not agree personally to violate the statute." *Neapolitan*, 791 F.2d at 498. Our decision is mandated not only by the plain language of the RICO statute, but also by the nature and purpose of the statute.

Section 1962(d) specifically prohibits a conspiracy to violate any of the substantive RICO provisions. 18 U.S.C. § 1962(d). Nothing in this language indicates that Congress intended to do anything more than to criminalize a conspiratorial objective – the violation of a substantive RICO provision. *Sutherland*, 656 F.2d at 1193; *Elliott*, 571 F.2d at 903; *Neapolitan*, 791 F.2d at 497. If we were to hold

that in addition to agreeing to the overall criminal objective, a RICO conspirator had to agree to perform the actual crime, two predicate acts comprising a substantive violation of RICO, this holding would be a marked departure from traditional conspiracy law for which there is no support in the language of the statute or the statutory history. *Neapolitan*, 791 F.2d at 497-98 ("Requiring an agreement personally to commit two predicate acts would establish a new form of conspiring in contradistinction to section 1962(d)'s base in traditional conspiracy law.").

The Congressional purpose in enacting RICO was to provide a new remedy to punish organized crime. *Id.* at 495 & 498; *see United States v. Barton*, 647 F.2d 224, 237-38 (2d Cir.1981) ("It is the purpose of this Act to seek the eradication of organized crime in the United States . . . by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crimes.") (quoting The Statement of Findings of the Organized Crime Control Act of 1970, 84 Stat. 923), *cert. denied*, 454 U.S. 857, 102 S.Ct. 307, 70 L.Ed.2d 152 (1981). To be guilty of a RICO violation, one must have violated other laws in a way that implicates RICO. *Neapolitan*, 791 F.2d at 497 ("The statute does not create a new type of crime; it establishes prerequisites for the imposition of harsher penalties."). Therefore to be an effective tool against organized crime, a RICO conspiracy should not require anything more than is required to conspire to violate any other federal crime. *Id.* This conclusion is bolstered by the

expansive reading that the Supreme Court has given the statute.[19]

Having concluded that a RICO conspirator need not agree to personally perform the two predicate acts which compose the substantive violation of RICO, we find that the court's instructions were an accurate statement of the law.[20]

V

Section 1963(a) provides that anyone who violates RICO must forfeit any interest that they have acquired or maintained in violation of the statute, any enterprise that they have established or conducted in violation of RICO, and any property constituting or derived from proceeds obtained from racketeering activity in violation of RICO.

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[19] *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 498, 105 S.Ct. 3275, 3286, 87 L.Ed.2d 346 (1985).

[20] Salinas also argues that there was insufficient evidence to support his conviction for RICO conspiracy. In reviewing a sufficiency of the evidence challenge, we view "the evidence in the light most favorable to the jury verdict and affirm[ ] if a rational trier of fact could have found that the government proved all essential elements of the crime beyond a reasonable doubt." *United States v. Puig-Infante*, 19 F.3d 929, 937 (5th Cir.), *cert. denied*, ___ U.S. ___, 115 S.Ct. 180, 130 L.Ed.2d 115 (1994). To prove a RICO conspiracy charge, the government must prove "that the defendant conspired to engage in a pattern of racketeering activity." *United States v. Marcello*, 876 F.2d 1147, 1152-53 (5th Cir.1989). To establish a pattern of racketeering activity, the government must prove "two predicate acts, each of which must be a criminal offense." *Id.* Having carefully reviewed the record, we conclude that there was sufficient evidence to convict Salinas of RICO conspiracy.

18 U.S.C. § 1963(a). Section 1963(m) provides that if by some "act or omission of the defendant" the government cannot locate the property it is authorized to forfeit by subsection (a), "the court shall order the forfeiture of any other property of the defendant up to the value of any property" that the defendant has made untraceable. 18 U.S.C. § 1963(m). The government sought the forfeiture of $151,000 in bribe proceeds from Marmolejo pursuant to 18 U.S.C. § 1963(a). Marmolejo argues that the court erred in authorizing the forfeiture of substitute assets without requiring the government to prove that he made unavailable the assets that he obtained from his violations of RICO. We review the district court's findings of fact under the clearly erroneous standard of review, and the question of whether those facts constitute legally proper forfeiture *de novo*. *United States v. 1977 Porsche Carrera*, 946 F.2d 30, 33 (5th Cir.1991).

One of the specific ways that § 1963(m) provides that the government can forfeit substitute property is if some of the property, "as a result of any act or omission of the defendant has been transferred or sold to, or deposited with, a third party." 18 U.S.C. § 1963(m)(2). At the forfeiture hearing, both Marmolejo and the government stipulated that if a government agent were called to testify he would testify that he could not locate the specific property the government sought to forfeit because "some of the property had been transferred, sold or deposited with third parties." Marmolejo's attorney specifically acknowledged that the government could not trace any of Marmolejo's assets. Furthermore, Marmolejo did not oppose the district court's Order of Forfeiture which specifically

stated that the parties stipulated that forfeiture of substitute assets was appropriate. Therefore, given that both parties stipulated that substitution of assets was appropriate, and because the court's decision was based on a legally proper ground, § 1963(m)(2), we hold that the forfeiture was proper.

VI

Defendants argue that the district court erred in denying their motions to suppress evidence seized pursuant to a search warrant that they allege was invalid.[21] In reviewing a district court's denial of a motion to suppress evidence obtained pursuant to a search warrant we must decide: "(1) whether the good-faith exception to the exclusionary rule applies; and (2) whether probable cause supported the warrant." *United States v. Satterwhite*, 980

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[21] Before trial, Marmolejo moved to suppress evidence obtained pursuant to three search warrants. Based on the affidavit of John Trevino, Special Agent of the Internal Revenue Service, Criminal Division, the government obtained three warrants to search Marmolejo's residence, ranch, and office. The warrant sought nine categories of items ranging from personal address and telephone books that would contain the addresses or telephone numbers of Marmolejo's associates to documents reflecting receipts or disbursements of money from Beltran to Marmolejo.

Salinas also sought to suppress evidence found pursuant to a search warrant that was also obtained based on Special Agent Trevino's affidavit. The warrant for Salinas' residence sought six categories of items ranging from personal address and telephone books that might contain Salinas' associates to a set of his and hers Rado watches given by Beltran to Salinas and his wife.

F.2d 317, 320 (5th Cir.1992) (footnote omitted). However, because this case does not involve novel issues of law that need to be resolved to assist law enforcement officers and magistrate judges in the future, we need not decide whether the warrant was supported by probable cause if we find that the good-faith exception to the exclusionary rule applies. *Id.*; *United States v. Restrepo*, 994 F.2d 173, 187 (5th Cir.1993).

"When a warrant is supported by more than a 'bare bones' affidavit, officers may rely in good faith on the warrant's validity" in conducting a search. *Satterwhite*, 980 F.2d at 321. However, an affidavit that contains only conclusions and "lack[s] the facts and circumstances from which a magistrate can independently determine probable cause" is considered "bare bones" and cannot be the basis of an objectively reasonable good-faith reliance by an officer. *Id.* We review *de novo* whether the good-faith exception to the exclusionary rule applies. *Id.* at 321.

We conclude that the affidavit which supported the search warrants for Marmolejo's residence, ranch, and office and Salinas' residence contained sufficient facts from which the magistrate could determine probable cause. The affidavit contains detailed first-hand observations by the affiant, as well as detailed information provided by informants whom the affiant establishes as reliable.[22] It describes the bribery scheme between

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[22] For example, the affidavit states that confidential source number one ("CS-1"):

> has provided information about Homero BELTRAN receiving special privileges and visits at the Hidalgo County Jail, as corroborated by CS-2, CS-3 and by

Beltran and Marmolejo in detail and Salinas' role in aiding and abetting it.[23] Many of the facts are corroborated

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testimony of a witness before the Federal Grand Jury in McAllen, Texas. CS-1 has also provided information that Homero BELTRAN gave a 1989 Pontiac Trans-Am to Brigido MARMOLEJO JR., which has been independently corroborated by a record check with the Texas Department of Motor Vehicles and by statements made to law enforcement officers participating in this investigation by the current owner of the vehicle that Brigido MARMOLEJO JR., was the former owner of the vehicle.

Another example of the reliability of the confidential sources demonstrated in the affidavit is:

> CS-3 has provided information to your affiant and other law enforcement officers for the past three months as to the ownership of real estate by a convicted drug trafficker, Homero BELTRAN, and that Brigido MARMOLEJO JR. was involved in the proposed sale of the property, which has been corroborated by CS-1, CS-2, and independent investigation by your affiant and special agents assigned to the DEA OCDETF group in McAllen, Texas.

[23] The affidavit explains that by September 1991, Beltran was receiving special privileges inside the jail because of an agreement that he had with a jail employee named Zavala. It recounts how Marmolejo then met with Beltran and agreed to increase the frequency and duration of Beltran's visits with his family. Initially, Beltran was to pay Marmolejo $5,000 per month for having at least one visit a week with his family. The affidavit describes how the agreement was renegotiated to allow for three visits per week for $5,000 per week and $1,000 per visit. The affidavit states that "CS-1 and CS-2 observed on several

by the observations of others and by taped conversations with Marmolejo which the affiant helped record.

Based on these facts, the magistrate could independently determine probable cause; therefore, the affidavit was more than "bare bones" which the officers could rely on in good faith. Since the officers acted in good faith in relying on the search warrants, we need not determine whether the warrants were supported by probable cause. We conclude that the defendants' motions to suppress were properly denied.[24]

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occasions Mario Salinas guarding the door to Brigido Marmolejo's office."

The affidavit describes the watches that Beltran bought for Marmolejo and Salinas and their wives. It also explains that Beltran gave Marmolejo $11,000 to complete a pavilion that Marmolejo was building at his ranch for his daughter's wedding. The affidavit further states that, "CS-2 was present when Brigido MARMOLEJO JR. had taken Mario SALINAS to his ranch and showed him the pavilion. Brigido MARMOLEJO JR. stated that 'if it was not for Homero BELTRAN, I wouldn't have the pavilion.' "

The affidavit also details the many financial transactions that Marmolejo entered into with Beltran.

[24] Salinas also argues that the search exceeded the scope of the search warrant because officers searched his car which was not authorized in the search warrants. As result, Salinas argues, all evidence obtained in the search should be suppressed. However, Salinas does not state what evidence from the vehicles, was discovered and admitted at trial. The only items of evidence the government admitted at trial that was seized pursuant to the search warrants were two Rado watches seized from Salinas' residence and a telephone number list seized from Salinas' office. Under the severability doctrine, evidence that is illegally seized has no effect on the admissibility of legally seized evidence. *United States v. Willey*, 57 F.3d 1374, 1390 (5th

VII

Salinas argues that his criminal prosecution was prohibited by the Double Jeopardy Clause. He contends that prior to his criminal trial, the government forfeited his property, two Rado watches, which constituted punishment for his crime, thereby precluding any subsequent punishment. The district court rejected Salinas' claim, finding that the government had suspended forfeiture proceedings and only intended to keep the watches as evidence for trial. We review the denial of a motion to dismiss on Double Jeopardy grounds *de novo*. *United States v. Arreola-Ramos*, 60 F.3d 188, 191 (5th Cir.1995).

Salinas' property was seized by the DEA for forfeiture under 21 U.S.C. § 881 as property used or acquired as the result of a drug-related offense.[25] The DEA sent Salinas a Notice of Seizure in November 1993. The Notice informed Salinas that he could either request remission or mitigation of the forfeiture within thirty days of his receipt of the notice, or contest the forfeiture within twenty days of the first date of publication of the notice – November 17, 1993. On December 30, 1993, Salinas sent a Petition for Remission, or in the Alternative for Mitigation of the Forfeiture which was then denied by the DEA.

Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 675, 133 L.Ed.2d 524 (1995); *United States v. Hamilton*, 931 F.2d 1046, 1054 (5th Cir.1991). Therefore, without any allegation of illegally seized evidence, Salinas' claim is without merit.

[25] The government's theory was that the watches had been purchased by Beltran with drug proceeds. Beltran was a well-known drug dealer who had made $4 to $5 million in profits from marijuana smuggling.

The DEA, however, never issued a Declaration of Forfeiture administratively forfeiting the watches.

Salinas argues that the watches were effectively forfeited when he failed to file a claim and post a bond contesting the forfeiture before the time for contesting expired on December 7, 1993. Salinas argues that this automatic forfeiture occurred because of 21 C.F.R. § 1316.77(a). Section 1316.77(a) provides

> For property seized by officers of the Drug Enforcement Administration, if . . . a claim and bond are not filed within the 20 days hereinbefore mentioned, the DEA Special Agent-in-Charge or DEA Asset Forfeiture Section shall declare the property forfeited. The DEA Special Agent-in-Charge or DEA Asset Forfeiture Section shall prepare the Declaration of Forfeiture and fovard [sic] it to the Administrator of the Administration as notification of the action he has taken.

21 C.F.R. § 1316.77(a). If Salinas were correct in arguing that automatic forfeiture occurs once the twenty days expire, then there would be no need for the statute to require that either the DEA Special Agent-in-Charge or DEA Asset Forfeiture Section "declare the property forfeited" and then prepare a "Declaration of Forfeiture." The statute would simply provide that the property is automatically forfeited once the twenty days had expired. We find that instead of authorizing automatic forfeiture, the statute authorizes the DEA to *declare* property forfeited when no person files a claim within the required period. *See United States v. Baird*, 63 F.3d 1213, 1217 (3d Cir.1995) ("Where no person files a claim to the seized property within the statutory

period, the agency is *authorized* to declare the property forfeited.") (citing 19 U.S.C. § 1609(b) and 21 C.F.R. § 1316.77) (emphasis added), *cert. denied*, ___ U.S. ___, 116 S.Ct. 909, 133 L.Ed.2d 841 (1996); *cf. Arreola-Ramos*, 60 F.3d at 190 (stating that once the time for making a claim and posting a bond has expired, the seizing agency automatically issues a declaration of forfeiture). However, if the agency does not issue a "Declaration of Forfeiture," the property is not forfeited. *Cf. Arreola-Ramos*, 60 F.3d at 190 (stating that the *declaration of forfeiture* by a seizing agency has "the same effect as a final decree and order of forfeiture entered in a judicial proceeding").

The Ninth Circuit, in a case that is factually similar to this one, recently rejected the exact argument that Salinas makes. *See United States v. Sanchez-Cobarruvias*, 65 F.3d 781 (9th Cir.), *cert. denied*, ___ U.S. ___, 116 S.Ct. 797, 133 L.Ed.2d 745 (1996). In *Sanchez-Cobarruvias*, United States Border Patrol Agents seized several guns from the defendant's car at which time the defendant filled out a Petition for Remission or Mitigation of Forfeiture form. The defendant was thereafter indicted for firearms violations. Customs officials then initiated civil administrative forfeiture proceedings against the defendant's car and sent him a Notice of Seizure explaining how the defendant could contest the forfeiture. After the twenty day claims period expired, the defendant moved to dismiss his criminal charges on double jeopardy grounds. The district court denied the motion, holding that no final disposition had taken place in the forfeiture proceedings; therefore, the property had not been forfeited, and jeopardy could not have attached. *Id.* at 782. The

Ninth Circuit affirmed the district court's denial of the defendant's motion to dismiss on double jeopardy grounds based on its interpretation 19 U.S.C. § 1609(a), which contains similar procedures as 21 C.F.R. § 1316.77.[26] The court stated,

> The fact that section 1609(a) uses mandatory rather than hortatory language means only that the government will declare seized property forfeited and proceed to auction it off, if there has been no challenge to the forfeiture proceedings; it does not mean that forfeiture is complete as a matter of law simply because the twenty days have passed. Put another way, a Declaration of Forfeiture or final Disposition Order is not an empty gesture; it is the means whereby the government legally obtains title to seized property in order to dispose of it.

Id. at 783-84. Because there had been neither a Declaration of Forfeiture nor a final Disposition Order, the Ninth Circuit held that there had been no finality to the forfeiture proceeding. *Id.* at 784. Therefore the defendant's property had not been forfeited, and there was no double jeopardy bar to his criminal prosecution.

The DEA has never issued a Declaration of Forfeiture for Salinas' watches. Consequently, we hold that there has been no finality to the forfeiture proceedings and therefore no forfeiture. As a result, jeopardy has not attached in the first proceeding to erect any potential bar to Salinas' subsequent criminal prosecution.

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[26] *See* 19 U.S.C. §§ 1608 and 1609(a) and (b).

VIII

The district court enhanced Marmolejo's sentence for obstruction of justice based on its belief that Marmolejo perjured himself at trial. Marmolejo argues that this was error because the court failed to give him adequate notice of its intent to enhance his sentence on this ground.

Parties must be given notice and an opportunity to comment on matters relating to sentencing. FED.R.CRIM.P. 32(a)(1); *Burns v. United States*, 501 U.S. 129, 137 & 138, 111 S.Ct. 2182, 2187, 115 L.Ed.2d 123 (1991). However, the Fifth Circuit has recently held that "if the defendant has actual knowledge of the facts on which the district court bases an enhancement or a denial of a reduction, the Sentencing Guidelines themselves provide notice of the grounds relevant to the proceeding sufficient to satisfy the requirements of Rule 32 and U.S.S.G. § 6A1.3." *United States v. Knight*, 76 F.3d 86, 88 (5th Cir.1996). Because Marmolejo had actual knowledge of the facts upon which the district court based its enhancement – his testimony at trial – Marmolejo had adequate notice of the court's intent to enhance his sentence for obstruction of justice.[27]

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[27] Marmolejo argues several other points of error, none of which have merit. First, Marmolejo argues that there was insufficient evidence to convict him of money laundering. Viewing the evidence in the light most favorable to the jury verdict, *see Puig-Infante*, 19 F.3d at 937, we find that a rational trier of fact could have found that the government proved beyond a reasonable doubt that Marmolejo was guilty of money laundering.

Marmolejo also contends that the district court erred by admitting hearsay evidence and disallowing other "critical impeachment evidence." We find that the district court did not abuse its discretion. *See United States v. Coleman*, 997 F.2d 1101, 1105 (5th Cir.1993) ("Rulings limiting the scope or extent of cross-examination are committed to the sound discretion of the trial court and are reviewed only for abuse of discretion."), *cert. denied*, ___ U.S. ___, 114 S.Ct. 893, 127 L.Ed.2d 86 (1994); *United States v. Vela*, 673 F.2d 86, 90 (5th Cir.1982) (stating that we review a trial court's decision to admit business records for abuse of discretion).

IX

For the foregoing reasons, we AFFIRM Marmolejo's sentence and both defendants' convictions.

E. GRADY JOLLY, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from Part II B of the majority's opinion. The majority holds that it is a federal crime for local jail officials to accept bribes for conjugal visits because conjugal visits constitute "business" or "transactions" of the Hidalgo County Jail. It reaches this conclusion even though the conduct in question did not affect federal funds directly or indirectly, the only congressional objective of this criminal statute. Moreover, the majority holds that these conjugal visits have a value of at least $5,000 based solely on the amount of the bribes received by the local jail officials. The majority thus enlarges the scope of this statute by effectively holding that the statute is violated whenever a bribe satisfies the transactional amount prescribed by the statute even when the transaction has no value to the jail and thus could have no effect on federal interests. With due respect for the majority, I

am unable to agree with this virtually unlimited expansion of 18 U.S.C. § 666(a)(1)(B).

(1)

As noted in the majority opinion, the statute requires that the government prove that the defendants were agents of the Hidalgo County Jail, and that the jail received, in any one-year period encompassing the defendants' conduct, more than $10,000 in "benefits" from a "Federal program" involving a grant or contract. 18 U.S.C. § 666(a)(1), (b) (1994). The government further must prove that the defendants, as agents of the jail, accepted "anything of value" from someone, and did so with the intent to be influenced or rewarded in connection with "any business, transaction, or series of transactions" of the jail "involving anything of value of $5,000 or more." § 666(a)(1)(B).

The majority concludes that the statute clearly encompasses the conduct of the defendants. I conclude that the statute clearly does not reach the conduct at issue. These two contrary positions, each supported by its own rationale, would lead one to conclude that the statute is ambiguous.

The majority parses the language of the statute to find clarity where, when fully considered, there is only ambiguity. Isolating words from the context of the statute, it focuses on "anything of value" instead of considering the whole of the phrase "any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more" so as to conclude that the statute is plain and clear that

valuations can be from the perspective of any of the parties involved. The Second Circuit persuasively demonstrated the ambiguity involved in this point when it recently rejected the "clarity" proclaimed by the majority here, by stating: "Sec. 666(a)(1)(B) is silent as to the identity of the person or entity to whom the '[ ]thing' must have at least a $5,000 value." *United States v. Foley*, 73 F.3d 484, 490 (2d Cir.1996).[28]

In its effort to fulfill the elemental requirements of the statute, specifically that the "transactions" had a "value of $5,000," the majority confuses and then fuses the value of the transactions with the amount of the bribe. Yet, the two are completely distinct under the statute. The text of the statute makes clear that the acceptance of "anything of value," i.e., the acceptance of the bribe, is a separate element of the crime from the amount of the transaction; consequently, the amount of the bribe has no statutory relevance to the value of the transaction. Stated differently, the value of the transaction cannot automatically be extrapolated from the amount of the bribe, but instead must be established on grounds independent, at least in some way, of the bribe. Our decision in *United States v. Westmoreland*, 841 F.2d 572 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988), illustrates the illogic of the majority's analysis in using the bribe to satisfy both the "anything of value"

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[28] The majority cites *Westmoreland* to support its claim that the statutory language is unambiguous. Slip. Op., at 4709 n. 7. The fact that we found the statutory language "plain and unambiguous" on one issue, namely, whether § 666(a)(1)(B) imposes a tracing requirement, does not mean that it is "plain and unambiguous" on all issues.

element of the crime and the "value of the transaction" element. There, a county supervisor accepted bribes totaling $2,202 in connection with the purchase of $14,482.92 worth of goods for the county. *Id.* at 575. The purchases made by the county supervisor constituted the series of transactions of the county "involving anything of value of $5,000 or more"; the bribes satisfied the "anything of value" element of the crime. In short, as applied in this case, the language of § 666(a)(1)(B) is at best ambiguous insofar as it concerns the method of valuing a transaction.

(2)

Given this ambiguity, it is necessary to turn to the legislative history for guidance in interpreting and applying the statute. *Hightower v. Texas Hospital Association*, 65 F.3d 443, 448 (1995). Faced with legislative history that does not support its reading of the statute, however, the majority evades grappling directly with the legislative history.[29] Instead, the majority falls back on generalized descriptions of that legislative history from our decision in *Westmoreland*. The majority states that its broad reading

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[29] The majority does quote a passage from the legislative history that directly contradicts its interpretation of § 666 without attempting to explain this contradiction:

> [18 U.S.C. § 666 was] designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and *bribery involving Federal monies* that are disbursed to private organizations or State and local governments pursuant to a Federal program.

Slip. Op., at 4709 (quoting S.Rep. No. 225, 98th Cong., 2d Sess., *reprinted in* 1984 U.S.C.C.A.N. 3182, 3510) (emphasis added).

of the language of the statute "squares with Congress's intent in enacting 18 U.S.C. § 666 to safeguard 'the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them.' " Maj.Op., at ___ (quoting 841 F.2d at 578). The majority also states that "Congress 'cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do.' " *Id.* at 4709 (quoting 841 F.2d at 577). Unfortunately, the majority quotes from *Westmoreland* without reviewing the context of the legislative history in which those descriptions arose. Such a review demonstrates the majority's inappropriate use of these descriptions to support its overly-broad reading of the reach of the statute.

In *Westmoreland*, a county supervisor was convicted of receiving kickbacks for purchases of county materials that involved only non-federal funds of the county. 841 F.2d at 573. The defendant argued that "the statute requires the involvement of federal, not merely state, funds in the allegedly corrupt transactions." 841 F.2d at 575. After reviewing the statutory language and the legislative history, we said:

> *[W]hile the legislative history manifests a congressional intent to preserve the integrity of federal funds,* Congress specifically chose to do so by enacting a criminal statute that would eliminate the need to trace the flow of federal monies and that would avoid inconsistencies caused by the different ways that various federal programs disburse funds and control their administration." *Id.* (emphasis added).

The court in *Westmoreland* thus recognized that the legislative history exhibited a clear intent to protect federal funds distributed to non-federal entities. Recognizing the difficulty involved in tracing federal funds, *Westmoreland* remained faithful to this congressional objective by holding that § 666 encompassed transactions involving non-federal funds of an entity receiving federal funds. *Westmoreland* did not hold that Congress meant to criminalize any act of bribery involving non-federal entities receiving federal funds, *but only those acts of bribery that could somehow be traced, directly or indirectly, to the integrity of federal program funds.* The majority's use of *Westmoreland's* generalized descriptions of the legislative history to support its overly-broad reading of the statute thus does not square with *Westmoreland's* own recognition of congressional purpose or the reasoning behind its holding.

Turning to the precise legislative history, I find that it clearly reveals that Congress did not intend for § 666(a)(1)(B) to be applied to conduct such as the acceptance of bribes to allow conjugal visits. Instead, Congress was only concerned with protecting the federal monies disbursed to non-federal entities. "This part of title XI is designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery *involving Federal monies* that are disbursed to private organizations or State and local governments pursuant to a Federal program." 1984 U.S.C.C.A.N. at 3510 (emphasis added). Congress also stated that "the purpose of this section [is] to *protect the integrity of the vast sums of money* distributed through Federal programs

from theft, fraud, and undue influence by bribery." *Id.* at 3511.

The majority's attempt to find support in the circuit court cases cited in the legislative history, *see* Slip Op., at 4710 n. 9; 1984 U.S.C.C.A.N. at 3511 & nn. 2-3, will not withstand a careful look. None of the cases from the legislative history cited by the majority supports the majority's reading of § 666(a)(1)(B) because the conduct at issue in those cases directly implicated federal monies. *United States v. Hinton*, 683 F.2d 195 (7th Cir.1982) (soliciting money in exchange for award of housing rehabilitation contracts funded by HUD), *aff'd sub nom., Dixson v. United States*, 465 U.S. 482, 104 S.Ct. 1172, 79 L.Ed.2d 458 (1984); *United States v. Mosley*, 659 F.2d 812 (7th Cir.1981) (receiving money in exchange for giving preferential treatment to individuals seeking jobs funded by Comprehensive Employment and Training Programs Act); *United States v. Del Toro*, 513 F.2d 656 (2d Cir.) (bribing city administrator to insure that program receiving funding from HUD would lease building), *cert. denied*, 423 U.S. 826, 96 S.Ct. 41, 46 L.Ed.2d 42 (1975). In this case, allowing conjugal visits to a federal prisoner, in no way that my eyes can see, implicates federal monies.

Furthermore, I have found nothing in the legislative history to indicate that Congress meant to reach acts of bribery – as the majority does – involving any and all official acts of agents of non-federal entities in the same way that 18 U.S.C. § 201 reaches acts of bribery involving

all official acts of federal agents.[30] Instead, Congress was focused on providing criminal sanctions precisely and only for abuse of, or threat to, federal monies that are disbursed to these non-federal entities. *Westmoreland* logically extends the reach of the statute – based on a recognition of the fungibility of money – to non-federal funds of that entity.

(3)

The majority's decision today also creates a split with the well-reasoned and more carefully crafted decision of the Second Circuit in *United States v. Foley*.[31] In *Foley*, a Connecticut legislator was convicted of receiving a bribe to help secure the passage of legislation that would have given a recently-merged bank a one-year exemption from a divestiture requirement. 73 F.3d at 486-87. Although the defendant received a $25,000 bribe and the exemption was worth more than $5,000 to the bank, the Second Circuit held that the transaction did not meet the "$5,000

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[30] Section 201 reads in part: "Whoever, being a public official . . . accepts . . . anything of value . . . for being influenced in the performance of any official act . . . shall be . . . imprisoned. . . . " 18 U.S.C. § 201(b) (1994). Congress was well aware of this provision when it passed § 666 because a circuit split concerning § 201's application to non-federal entities motivated congressional action on § 666. *See* 1984 U.S.C.C.A.N. at 3510-11.

[31] Surprisingly, the majority supports its holding by citation to *United States v. Mongelli*, 794 F.Supp. 529, 531 (S.D.N.Y.1992), Slip Op., at 4711, 4712, a decision *overruled* by the Second Circuit in *Foley*. *See* 73 F.3d at 496 (Lumbard, J., dissenting).

or more" requirement of § 666(a)(1)(B) because the government had not shown that the exemption was worth at least $5,000 to the State of Connecticut. "[T]he exemption affected neither the financial interests of the protected organization nor federal funds directly." *Id.* at 493. Based on a clear understanding of the congressional objective in enacting § 666, the Second Circuit determined that the proper method to value a transaction is from the perspective of the protected entity, not from the perspective of "any willing buyer," as the majority would have us accept. Slip Op., at 4711. The *Foley* court stated:

> [T]he value of a thing for purposes of § 666(a)(1)(B) is not to be assessed by reference to any and every perspective or measure of value, no matter how subjective or arbitrary. Instead, the assessment of the thing's value must be connected, even if only indirectly, to the integrity of federal program funds.

73 F.3d at 490.

In an effort to distinguish *Foley* from these facts and from Fifth Circuit law, the majority contends that the defendant in the Fifth Circuit's *Westmoreland* decision would not have been convicted under *Foley* because the transaction in that case did not involve federal funds. Slip Op., at 4711 n. 10. Based on two quoted passages from *Foley* mentioning federal funds, the majority strains to conclude that the *Foley* Court held that federal funds must be involved in the transaction and that, therefore, the decision conflicts with *Westmoreland*. *Id.* A casual reading of *Foley* will reveal the majority's erroneous interpretation of that decision. First, *Foley* cites with approval our decision in *Westmoreland*. 73 F.3d at 491. Second, the

Foley Court noted that the Second Circuit has already held that the government is not required to trace the corrupt transaction to federal program funds. *Id.* at 490-91 (citing *United States v. Coyne*, 4 F.3d 100, 108-10 (2d Cir.1993), *cert. denied*, ___ U.S. ___, 114 S.Ct. 929, 127 L.Ed.2d 221 (1994)).[32] Third, the *Foley* Court recognized that the corrupt transaction violated § 666(a)(1)(B) if it affected *either* "the financial interests of the protected organization" *or* "federal funds directly." *Id.* at 493. The majority's attempt to distinguish *Foley* is, I respectfully submit, superficial.

(4)

Finally, I would observe that when a criminal statute only ambiguously applies to the conduct in question, surely the rule of lenity counsels that we construe the statute in favor of the defendant. *Liparota v. United States*, 471 U.S. 419, 427, 105 S.Ct. 2084, 2089, 85 L.Ed.2d 434 (1985).

(5)

To summarize, in interpreting § 666(a)(1)(B), we first must look to the specific statutory language, and in the light of its ambiguity, the legislative history, to determine whether *this* provision intends to reach *this* conduct. *Dowling v. United States*, 473 U.S. 207, 213, 105 S.Ct. 3127, 3131, 87 L.Ed.2d 152 (1985) ("[W]hen assessing the reach

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[32] The *Coyne* court itself recognized that it "agree[s] with the other circuits who have considered the question," including *Westmoreland*. 4 F.3d at 110.

of a federal criminal statute, we must pay close heed to language, legislative history, and purpose in order strictly to determine the scope of the conduct the enactment forbids"). Neither the plain language nor the legislative history indicates that Congress wrote this provision to reach the acceptance of bribes for conjugal visits, conduct that left both federal and state fiscs untouched. Congress intended to reach only conduct involving – directly or indirectly – the fiscal integrity of non-federal entities receiving federal monies. Because the defendant's conduct in no discernable way implicated the fiscal integrity of the Hidalgo County Jail, and because the majority's reading of the statute contradicts the clear expression of congressional intent in the legislative history, I respectfully dissent.

APPENDIX 2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-60812

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

BRIGIDO MARMOLEJO, JR; MARIO SALINAS

Defendants - Appellants

Appeal from the United States District Court
for the Southern District of Texas, Laredo

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

(Opinion 7/17/96, 5 Cir., ___, ___ F.3d ___)

(Filed Aug. 15, 1996)

Before JOLLY, WIENER, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(✓) The Petitions for Rehearing are DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) The Petitions for Rehearing are DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRA and Local Rule 35) the Suggestions for Rehearing En Banc are also DENIED.

( ) A member of the court in active service having requested a poll on the reconsiderations of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearings En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Emilio M. Garza
United States Circuit Judge

REHG-15

APPENDIX 3

ARTICLE [IV]

The right of the people to be secure in their persons, houses, papers,and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

ARTICLE [V]

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

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18 U.S.C. § 666. Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists –

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof –

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that –

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess

of $10,000 under a federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section –

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or governments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include

time both before and after the commission of the offense.

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18 U.S.C. § 4002. Federal prisoners in State institutions; employment

For the purpose of providing suitable quarters for the safekeeping, care and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Such Federal prisoner shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.

The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary and healthful quarters and subsistence for such persons.

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18 U.S.C. § 1961. Definitions

As used in this chapter –

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating too wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia),

section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United

States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

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18 U.S.C. § 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

A purchase of securities in the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

APPENDIX 4

United States Department of Justice — Intergovernment Service Agreement

United States Marshals Service — *Housing of Federal Prisoners*

1. AGREEMENT NUMBER
   J-D79-M-001

2. EFFECTIVE DATE
   9/1/84

3. REQUISITION/PURCHASER/REQUEST NO.
   0181-D79-84

4. CONTROL NO.

5. ISSUING OFFICE
   UNITED STATES MARSHALS SERVICE
   Operations Support Division
   Program Administration Branch
   1-TYSONS CORNER CENTER
   MCLEAN, VIRGINIA 22102

6. GOVERNMENT ENTITY FACILITY CODE(S) 6GV

   NAME AND ADDRESS (*Street, city, county, State and ZIP code*)

   [Hidalgo County Detention Center, P.O. Box 359 Edingburg, Texas 78539]

   Contact Person Juan Jose Munoz, Chief
   Area Code & Telephone No. (512) 383-8114 ext. 73

8. ITEM NO. (1)

9. SUPPLIES/SERVICES This Agreement is for the housing, safekeeping and subsistence of adult male and female federal prisoners in accordance with the contents set forth herein.

10. QUANTITY ESTIMATED USMS PRISONER DAYS/ YR. 36,500

11. UNIT PDs

12. UNIT PRICE FIXED RATE $25.09

13. AMOUNT ESTIMATED ANNUAL PAYMENT $915,785

ITEM NO. (2)

SUPPLIES/SERVICES This Agreement consists of the following:

(A) I-G-A Cover Page, Form #241
(B) Agreement Schedule, pages 2-5.

14. *AGENCY CERTIFYING*

To the best of my knowledge and belief, data submitted in support of this agreement is true and correct, the document has been duly authorized by the governing body of the Department or Agency and the Department or Agency will comply with ALL PROVISIONS SET FORTH HEREIN.

15. NAME AND TITLE OF PERSON(S) AUTHORIZED TO SIGN OFFER.

/s/ Brig Marmolejo _____ Date 9-13-84
(Signature)

/s/ Brig Marmolejo _____ Sheriff
Name *(Type or Print)* Title

_____ Date _____
(Signature)

_____ _____
Name *(Type or Print)* Title

16. TYPE OF USE

[ ] Hold Over
■ Regular Support
[ ] Seasonal Support
[ ] Other

17. PRISONER TYPE TO BE INCLUDED

UNSENTENCED	SENTENCED
■ Adult Male	■ Adult Male
■ Adult Female	■ Adult Female
[ ] Juvenile Male	[ ] Juvenile Male
[ ] Juvenile Female	[ ] Juvenile Female
■ Aliens	[ ] Work Release
	[ ] YCA Male
	[ ] YCA Female

18. LEVEL OF USE

[ ] Minimum
[ ] Medium
■ Major

19. *This Negotiated Agreement is Hereby Approved and Accepted for*

THE UNITED STATES OF AMERICA
BY DIRECTION OF THE DIRECTOR OF THE
UNITED STATES MARSHALS SERVICE

BY /s/ JB Enders
(SIGNATURE OF CONTRACTING OFFICER)

20. ANTICIPATED ANNUAL USAGE

	UNSENTENCED	SENTENCED	ALIENS	TOTAL
No. of Prisoners	100			100
Prisoner Days	36,500			36,500
Guard Hours				

21. NAME OF AUTHORIZING OFFICIAL
(Type or Print)

Joseph B. Enders

DATE SIGNED

August 30, 1984

UNITED STATES MARSHALS SERVICE
AGREEMENT SCHEDULE
(SUPPORT OF U.S. PRISONERS)

ARTICLE I – PURPOSE

The purpose of this Intergovernmental Service Agreement (IGA) is to establish a formal binding relationship between the U.S. Marshals Service and other federal user agencies (the government) and Hidalgo County, Texas (The County) for the detention of persons charged with or convicted of violations of federal law or held as material witnesses (federal prisoners) at the Hidalgo County Jail (the facility).

ARTICLE II – SUPPORT AND MEDICAL SERVICES

1. The County agrees to accept and provide for the secure custody, care and safekeeping of federal prisoners in accordance with state and local laws, standards, policies, procedures, or court orders applicable to the operations of the facility.

2. The County agrees to provide federal prisoners with the same level of medical care and services provided local prisoners including the transportation and security for

prisoners requiring removal from the facility for emergency medical services. All costs associated with hospital or health care services provided outside the facility will be paid directly by the government.

3. The County agrees to notify the U.S. Marshal as soon as possible of all emergency medical cases requiring removal of a prisoner from the facility and to obtain prior authorization for removal for all other medical services required.

ARTICLE III – RECEIVING AND DISCHARGE

1. The County agrees to accept as federal prisoners those persons committed by federal law enforcement officers for violations of federal laws only upon presentation by the officer of proper law enforcement credentials.

2. The County agrees to release federal prisoners only to law enforcement officers of agencies initially committing the prisoner (i.e. DEA, INS, etc.) or to a Deputy United States Marshal. Those prisoners who are remanded to custody by a U.S. Marshal may only be released to a U.S. Marshal or an agent specified by the U.S. Marshal of the Judicial District.

3. Federal prisoners may not be released from the facility or placed in the custody of state of local officials for any reason except for medical or emergency situations. Federal prisoners sought for a state or local court proceeding must be acquired through a Writ of Habeas Corpus or the Interstate Agreement of Detainers and then only with the concurrence of the District U.S. Marshal.

ARTICLE IV – PERIOD OF PERFORMANCE

This Agreement shall remain in effect for a period of Fifteen (15) years after completion of the Cooperative Agreement 4-79-84 and indefinitely thereafter until terminated in writing by either party. After the 15 year period provided for in CAP Agreement 4-79-84 is completed, if conditions of an unusual nature occur making it impractical or undesirable to continue to house prisoners, the County may suspend or restrict the use of the facility by any or all federal agencies by giving written notice to the U.S. Marshal and the affected user agency. Such notice will be provided 30 days in advance of the effective date of formal termination and at least two weeks in advance of a suspension or restriction of use unless an emergency situation requires the immediate relocation of prisoners.

ARTICLE V – ECONOMIC PRICE ADJUSTMENT

1. Payment rates shall be established on the basis of actual costs associated with the operation of the facility during a recent annual accounting period or upon an approved annual operating budget.

2. The rate may be renegotiated not more than once per year, after the Agreement has been effective for twelve months.

3. The County may initiate a request for a rate increase or decrease by notifying the U.S. Marshal in writing at least 60 days prior to the desired effective date of the adjustment. Each rate adjustment submitted must include a completed Basic Data Sheet and Certification Form available from the U.S. Marshal. The County agrees to

provide additional cost information to support a rate increase and to permit an audit of accounting records upon request of the Marshals Service.

4. Criteria used to evaluate the increase or decrease in the per-capita rate shall be those specified in the federal cost standards for contracts and grants with State and local governments issued by the Office of Management and Budget.

5. The effective date of the rate modification will be negotiated and specified on the IGA Modification form approved and signed by a Marshals Service Contracting Officer. The effective date will be established on the first day of a month for accounting purposes. Payments at the modified rate will be paid upon the return of the signed modification by the authorized local official to the U.S. Marshal.

6. Unless other justifiable reasons can be documented by the County, per diem rate increases shall not exceed the National Inflation rate as established by the U.S. Department of Commerce.

ARTICLE VI – FINANCIAL PROVISIONS

1. The billing addresses of the agencies using this facility are as follows:

United States Marshal
515 Rusk Avenue
Houston, Texas 77002
Phone: (713) 229-2800

Immigration & Naturalization Service
Asst. Regional Commissioner, PMP
311 North Stemmons Freeway
Dallas, Texas 75207
Phone: (214) 729-6089

Bureau of Prisons
Community Programs Manager
2320 La Branch Street
Houston, Texas 77004
Phone: (713) 750-1755

2. The government shall reimburse the County at the fixed rates identified on page one of the agreement. The rates cover one person per prisoner day. The government may not be billed for two days when a prisoner is admitted one evening and removed the following morning. The County may bill for the day of arrival but not for the day of departure.

3. The Prompt Payment Act, Public Law 97-177 (96 Stat. 85, 31 USC 1801) is applicable to payments under this agreement and requires the payment to the County of interest on overdue payments. Determinations of interest due will be made in accordance with the provisions of the Prompt Payment Act and the Office of Management and Budget Circular A-25.

4. Payment under this agreement will be due on the thirtieth (30th) calendar day after receipt of a proper invoice, in the office designated to receive the invoice. The date of the check issued in payment shall be considered to be the date payment is made.

5. The original invoice shall be submitted to the government office that has been designated to receive invoices, as stated in paragraph 1. To constitute a proper invoice, the invoice must include the name, title, phone number and complete mailing address of the official of the designated payment office. In addition, it shall list each federal prisoner, the specific dates of confinement for each, the

total days to be reimbursed, the agreed upon rate per day and the total amount billed (total days multiplied by the rate per day).

ARTICLE VII – GOVERNMENT FURNISHED PROPERTY

1. It is the intention of the Marshals Service to furnish excess federal property to local governments for the specific purpose of improving jail conditions and services. Accountable excess property, such as furniture and equipment, remains titled to the Marshals Service and shall be returned to the custody of the Marshals Service upon termination of the agreement.

2. The County agrees to inventory, maintain, repair, assume liability for and manage all federally provided accountable property and to immediately report the loss or destruction of accountable property to the U.S. Marshal. Annual inventory reports will be provided by the County to the U.S. Marshal.

3. The suspension of use or restriction of bed space made available to the Marshals Service are agreed to be grounds for the recall and return of any or all government furnished property.

4. The dollar value of property provided each year will not exceed the annual dollar payment made by the Marshals Service for prisoner support.

ARTICLE VIII – MODIFICATIONS/DISPUTES

1. Either party may initiate a request for modification to this agreement in writing. All modifications negotiated

will be written and approved by the U.S. Marshals Service contracting officer and submitted to the County on form USM 241a for approval.

2. Disputes, questions or concerns pertaining to this agreement other than CAP space guarantees will be resolved between the U.S. Marshal and the appropriate County official. Unresolved issues are to be directed, in writing, to the Chief, Operations Support Division, U.S. Marshals Service Headquarters.

ARTICLE IX – INSPECTION AND TECHNICAL ASSISTANCE

1. The County agrees to allow periodic inspections of the facility by U.S. Marshals Service Inspectors. Findings of the inspection will be shared with the facility administrator in order to promote improvements to facility operations, conditions of confinement and levels of services.

2. The Marshals Service will endeavor to provide or acquire technical training and management assistance from other federal, state or local agencies or national organizations upon the request of the facility administrator.

ARTICLE X – SPECIAL PROVISIONS

Upon the execution of Cooperative Agreement Number 4-79-84 the County agrees to provide 20 detention spaces for Federal prisoners on a daily basis and upon the completion of the project, the County agrees to provide 100 spaces for federal user agencies each day for a period of 15 years.

APPENDIX 5

* * *

[p. 1138] HOUSE PRISONERS IN THE HIDALGO COUNTY JAIL?

A YES, SIR.

Q AND THE SAME THING BETWEEN SEPTEMBER 1ST, 1992 AND SEPTEMBER 1ST, 1993?

A YES, SIR.

MR. SUROVIC: YOUR HONOR, THE GOVERNMENT WOULD OFFER WHAT'S BEEN MARKED AS GOVERNMENT EXHIBITS NO. 95 AND 96 INTO EVIDENCE.

MR. CANALES: NO OBJECTION.

THE COURT: ALL RIGHT. THAT'S THE SAME ISSUE OF HOW MUCH . . . WHETHER THERE'S A CERTAIN AMOUNT OF MONEY PAID TO THE JAIL. WE'LL ADMIT THAT AND YOU CAN HAVE THAT.

ALL RIGHT. 95 AND 96 ARE IN.

MR. SUROVIC: WE HAVE NO FURTHER QUESTIONS OF THIS WITNESS, YOUR HONOR.

THE COURT: THANK YOU, MA'AM. YOU CAN GO HOME.

MR. ENRIQUEZ: YOUR HONOR, I DO HAVE QUESTIONS.

THE COURT: WELL, WAIT A MINUTE.

CROSS-EXAMINATION

BY MR. ENRIQUEZ:

Q MS. MOTES, WOULD YOU AGREE THAT THESE PAYMENTS THAT YOU'VE TESTIFIED ABOUT ARE CONTRACT PAYMENTS FOR SERVICES RENDERED?

A YES, SIR.

Q THEY'RE NOT GRANT MONEY OR FEDERAL ASSISTANCE OR [p. 1139] ANYTHING OF THAT NATURE?

A NO, SIR.

MR. ENRIQUEZ: NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT.

(WITNESS EXCUSED FROM THE (COURTROOM

MR. SUROVIC: YOUR HONOR, AT THIS TIME, WE'LL CALL MR. MANUEL DE LEON.

(WITNESS PRESENT

THE COURT: COME ON UP HERE AND BE SWORN IN, PLEASE?

(WITNESS COMPLYING

THE COURT: JUST STAND RIGHT THERE. WOULD YOU RAISE YOUR RIGHT HAND?

(MANUEL DE LEON, JR., (GOVERNMENT WITNESS, SWORN

THE COURT: SIT DOWN AND BE COMFORTABLE AND . . . NOW THAT YOU'RE SITTING, PULL THAT, AS BEST YOU CAN . . .

(WITNESS COMPLYING

THE COURT: THERE YOU GO, AND THEN TALK DIRECTLY INTO THAT AND TALK TO THE JURORS OVER THERE. OKAY?

THE WITNESS: YES, SIR.

DIRECT EXAMINATION

BY MR. SUROVIC:

Q WOULD YOU STATE YOUR FULL NAME, PLEASE?

A MANUEL DE LEON, JR.

. . . .

APPENDIX 6

* * *

[p. 1769] FACT, THIS PATTERN GOING ON AT ALL. IF YOU'VE ALREADY DECIDED IN COUNT ONE THAT THERE IS NO SUCH PATTERN GOING ON, WELL, THAT'S THE END OF COUNT ONE, AND IT'S ALSO THE END OF COUNT TWO.

BUT IF YOU HAVE FOUND THAT THIS PATTERN IS GOING ON, YOU WOULD'VE ALREADY GONE THROUGH A WHOLE SERIES OF ACTS FOR MARMOLEJO AND YOU WOULD'VE ONLY GONE THROUGH TWO FOR MR. SALINAS. WHAT YOU'RE BEING ASKED TO DECIDE IN COUNT TWO IS . . . IF SALINAS WAS ONLY INVOLVED IN ONE OR TWO OR EVEN NONE, DID HE, NEVERTHELESS, KNOW ABOUT THIS PATTERN. DID HE KNOW THAT THIS WHOLE PATTERN OF ACTIVITY WAS GOING ON AND DID HE THEN KNOWINGLY AND WILLFULLY JOIN IN AND PARTICIPATE AND CONTRIBUTE IN SOME FASHION.

NOW, PARTICULARLY HERE, THE EVIDENCE IS . . . AND THIS IS EVIDENCE THAT YOU CAN TAKE OR LEAVE. I'M NOT ENDORSING IT. BUT THE EVIDENCE IS THAT ON SOME OCCASIONS . . . THAT WERE FRANKLY NOT SPECIFIED, AS TO WHICH ONES. BUT ACCORDING TO THE GOVERNMENT WITNESSES, THAT ON TWO OR THREE OCCASIONS, THAT SALINAS WOULD, IN EFFECT, TAKE OVER. THAT HE WOULD NOT RECEIVE THE MONEY, BUT THAT HE WOULD BE SORT OF THE DEPUTY, WHICH IS WHAT HE WAS, AND THAT THE INSTRUCTIONS

WERE, "IF I'M NOT IN AND YOU WANT THESE SERVICES, CALL DEPUTY SALINAS AND HE'LL TAKE CARE OF IT FOR YOU". SO THE GOVERNMENT POINTS TO THAT AS EVIDENCE THAT HE KNOWINGLY AND WILLFULLY PARTICIPATED IN THIS SCHEME EVEN THOUGH HE HIMSELF WAS NOT RECEIVING

* * *

APPENDIX 7

* * *

[p. 1590] SENSE I'M GETTING IS THAT THAT'S WHERE THE SPLIT OF THE CIRCUITS IS. I'M JUST SAYING TO YOU, COUNSEL, AND I'M NOT TRYING TO HURT YOUR CLIENT, BUT IT JUST SEEMS TO ME THAT I'M EITHER NOT GOING TO DO IT AT ALL OR . . . IT EITHER DOESN'T MAKE ANY SENSE TO ME AT ALL, HOW TO DO IT, AS I'VE SAID, OR IF WE'RE GOING TO DO IT AT ALL . . . SEE, IT WOULDN'T HURT MY FEELINGS IF THE GOVERNMENT JUST SAYS, LET'S JUST DROP COUNT TWO, BECAUSE, AS I SAY, I THINK IT'S TOTALLY REDUNDANT AS TO MARMOLEJO, TOTALLY REDUNDANT.

AND AS TO SALINAS, IT'S JUST REALLY KIND OF A DIFFERENT SHOT. IT MAKES A LITTLE MORE SENSE FOR SALINAS, BUT OTHER THAN THAT, WHAT I'M SAYING IS . . . THE ONLY WAY I CAN SUBMIT IT, THAT MAKES ANY SENSE, IS . . . AND I WOULDN'T DO THIS JUST TO MAKE IT UP, EXCEPT THAT IT DOES LOOK LIKE VIRTUALLY EVERY CIRCUIT, RECENTLY, THAT'S WRITTEN ON THIS SUBJECT, WRITES ON IT THE WAY I'M TALKING ABOUT IT. AND THERE'S THIS PROBLEM THAT THERE'S SOME OLD FIFTH CIRCUIT CASES THAT ARGUABLY MEAN SOMETHING ELSE.

NOW, THE ELEVENTH CIRCUIT, SUPPOSEDLY, HAS NOW SAID THAT THE FIFTH PROBABLY NEVER MEANT THAT AND WOULDN'T MEAN IT TODAY. THAT CASE YOU ALL GAVE ME A MONTH OR TWO AGO SAYS, "WELL, WE DON'T NEED TO REACH

THAT", BUT I'M JUST SAYING THAT EVEN IF I GET REVERSED ON IT, AT LEAST WE'LL GET THE LAW CLEARED UP. BUT IT JUST DOESN'T MAKE ANY SENSE . . . IT DOESN'T MAKE ANY SENSE TO SUBMIT IT THE OTHER WAY, BECAUSE IT

* * *

APPENDIX 8

* * *

[p. 1243] I'LL PAY YOU, AND SO HE ASKED HIM TEN TIMES TO DO IT.

MR. CANALES: IT'S A VENDOR SITUATION. IF I HAPPEN TO HAVE FOUR PEOPLE HERE AND I HAVE FOUR SEPARATE TRANSACTIONS, FOUR SEPARATE INDIVIDUALS, SURE, IT IS, BUT WHEN I HAVE ONE GUY COMING AND TELLING ME, LOOK, HERE'S THE DEAL. WE'RE GOING TO PAY YOU, YOU KNOW, TWO HUNDRED THOUSAND, BUT WE'RE GOING TO BREAK IT UP AND –

THE COURT: BUT THAT'S NOT EXACTLY THE DEAL. THE DEAL IS, I'D LIKE TO DO CERTAIN THING. I WANT SOMETHING FROM YOU, AND EVERY TIME I ASK YOU FOR THAT, I'LL PAY YOU FOR IT.

MR. CANALES: IT'S ONE AGREEMENT. IT'S ONE AGREEMENT.

THE COURT: OH, IT MAY BE ONE AGREEMENT, BUT THEN –

MR. CANALES: ONE SCHEME, ONE SCHEME. IT'S ONE SCHEME. IT'S NOT TWO SCHEMES, BUT ONE SCHEME.

THE COURT: OKAY. BUT I DON'T KNOW THAT . . . IF WE'RE TALKING ABOUT SCHEMES, AS MUCH AS WE'RE TALKING ABOUT ACTS, IT'S A WHOLE SERIES OF ACTS OF BRIBERY. I MEAN, GRANTED, IT'S ONE ARRANGEMENT, BUT –

MR. CANALES: SURE. THAT'S WHAT I'M SAYING. AND ONE ARRANGEMENT MEANS ONE ARRANGEMENT WITH . . . I'M GOING TO PAY YOU EVERY WEEK OR EVERY MONTH. IT'S ONE SCHEME. IT'S NOT ONE DEAL.

THE COURT: OKAY. BUT I THINK IT'S DIFFERENT THAN SAYING, YOU HAVE DONE THIS FAVOR FOR ME, ONE FAVOR. I NOW

* * *

APPENDIX 9

• • •

[p. 1273] ONE . . . FOR EXAMPLE, TAKE SALINAS. I MEAN, I'M COMFORTABLE THAT THERE'S EVIDENCE THAT ON SEVERAL OCCASIONS, HE WAS A STAND-IN AND SO FORTH, BUT ARE THOSE . . . WILL THAT KIND OF EVIDENCE DO OR DO WE HAVE TO . . . DO I HAVE TO TRY TO FIGURE OUT THAT YOU HAVE PROVED A PRECISE DAY WHEN HE HAS STOOD IN FOR HIM?

NOW, I KNOW YOU'VE GOT THE ALLEGATION OF THE PICKUP TRUCK AND THE WATCHES, WHICH ARE EASY, BUT ASIDE FROM THOSE, CAN I JUST TELL THE JURY, DO YOU FIND . . . I MEAN, IT WOULD BE ENOUGH IF YOU FOUND THAT ON TWO OR THREE OCCASIONS, HE WAS THE SUBSTITUTE, THE SURROGATE, FOR THE SHERIFF. IS THAT ENOUGH OR DO THEY HAVE TO PICK OUT WHICH ONE? AND THE SAME THING WITH MR. FLORES. I MEAN, ADMITTEDLY, HE BROUGHT THE FELLOW DOWN A COUPLE OF TIMES, AND I'M NOT SURE THAT'S ENOUGH, BUT EVEN IF IT IS, DO I HAVE TO BE SATISFIED THAT WE KNOW WHICH EXACT TIME HE DID THAT? TO TIE IT IN TO A PARTICULAR ACT, OR WHAT?

MR. SUROVIC: YOUR HONOR, MY UNDERSTANDING OF THE RACKETEERING CONSPIRACY CASE LAW IS THAT CASES HAVE BEEN OVERTURNED WHEN IT WAS UNCLEAR FROM THE RECORD WHICH PARTICULAR RACKETEERING ACTS, ESPECIALLY IF THEY WERE LESS THAN . . . YOU KNOW,

LESS THAN TWO RACKETEERING ACTS, WERE IDENTIFIED WITH EACH INDIVIDUAL. EACH INDIVIDUAL HAS TO BE IDENTIFIED WITH AT LEAST TWO SPECIFIC RACKETEERING ACTS.

THE COURT: SO WHAT DO WE DO WITH THAT THEN? I

• • •

APPENDIX 10

United States District Court

SOUTHERN DISTRICT OF TEXAS

In the Matter of the Search of

(Name, address or brief description of person or property to be searched)

THE RESIDENCE OF MARIO SALINAS LOCATED AT #74 SANTA FE, EDINBURG, HIDALGO COUNTY, TEXAS BEING DESCRIBED AS A ONE-STORY BROWN BRICK RESIDENCE. (SEE ATTACHMENT "A")

SEARCH WARRANT
CASE NUMBER:
M-93-998-MO-D

TO: S/A John Trevino and any Authorized Officer of the United States.

Affidavit(s) having been made before me by

S/A John Trevino who has reason to believe
Affiant

that _ on the person of or X on the premises known as (name, description and/or location)

(SAME AS ABOVE)

in the SOUTHERN District of TEXAS there is now concealed a certain person or property, namely (describe the person or property)

(SEE ATTACHMENT "B")

I am satisfied that the affidavit(s) and any recorded testimony establish probable cause to believe that the person

or property so described is now concealed on the person or premises above-described and establish grounds for the issuance of this warrant.

YOU ARE HEREBY COMMANDED to search on or before 8/24/93
Date

(not to exceed 10 days) the person or place named above for the person or property specified, serving this warrant and making the search (in the daytime – 6:00 A.M. to 10:00 P.M.) (~~at any time in the day or night as I find reasonable cause has been established~~) and if the person or property be found there to seize same, leaving a copy of this warrant and receipt for the person or property taken, and prepare a written inventory of the person or property seized and promptly return this warrant to Peter E. Ormsby as required by law.
U.S. Judge or Magistrate

8/17/93 6:07 PM
Date and Time Issued

at McAllen, Texas
City and State

Peter E. Ormsby,
U.S. Magistrate
Name and Title of Judicial Officer

/s/ Peter E. Ormsby
Signature of Judicial Officer

08/17/93 08/18/93 @9:35am Mario Salinas

INVENTORY MADE IN THE PRESENCE OF
Mario Salinas and S/A Bob Guerra

INVENTORY OF PERSON OR PROPERTY TAKEN PURSUANT TO THE WARRANT
- ONE BOX OF MISC. BILLS AND DOCUMENTS FROM BED ROOM #1

- ONE BLUE BOX CONTAINING MISC. INCOME TAX INFO. INCLUDING THE YRS. 1984, 1986, 1987, 1988, 1989, 1990, 1991, AND 1992
- ONE GOLD NECKLACE W/DIAMONDS AND A RUBY
- ONE PERSONALIZED ANALYSIS FROM MASSACHUSETTS LIFE
- TWO RADO WATCHES
- $500.00 (U.S. CURRENCY) FROM A BLACK BAG FOUND IN THE LINCOLN
- $426.00 (U.S. CURRENCY) FROM A BLUE SHIRT IN THE M.B. CLOSET
- MISC. BILLS, TELEPHONE RECORDS, RECEIPTS AND PAPERWORK SEIZED THROUGHOUT THE RESIDENCE
- ONE ROLEX (SILVER/GOLD) WATCH SEIZED FROM THE MASTER BEDROOM

CERTIFICATION

I swear that this inventory is a true and detailed account of the person or property taken by me on the warrant.

/s/ illegible

Subscribed, sworn to, and returned before me this date.

/s/ Peter E. Ormsby — 8/20/93
U.S. Judge or Magistrate — Date

[Receipt For Cash Or Other Items Omitted In Printing]

United States District Court

SOUTHERN DISTRICT OF TEXAS

In the Matter of the Search of

(Name, address or brief description of person, property or premises to be searched)

THE RESIDENCE OF MARIO SALINAS LOCATED AT #74 SANTA FE, EDINBURG, HIDALGO COUNTY, TEXAS BEING DESCRIBED AS A ONE-STORY BROWN BRICK RESIDENCE. (SEE ATTACHMENT "A")

APPLICATION AND AFFIDAVIT FOR SEARCH WARRANT
CASE NUMBER: M-93-998-MO-D

I S/A John Trevino being duly sworn depose and say

I am a(n) Special Agent of the Internal Revenue Service – CID and have reason to believe that _ on the person of or X on the property or premises known as (name, description and/or location)

(SAME AS ABOVE)

in the Southern District of Texas

there is now concealed a certain person or property, namely (describe the person or property to be seized)

(SEE ATTACHMENT "B")

which is (state one or more bases for search and seizure set forth under Rule 41(b) of the Federal Criminal Procedure)

Subject to seizure as evidence of the commission of a criminal violation concerning a violation of Title 18

United States Code, Section(s) 666,1956,1957,1962, AND 1963 The facts to support a finding of Probable Cause are as follows:

(SEE ATTACHED AFFIDAVIT BY S/A JOHN TREVINO)

Continued on the attached sheet and made a part thereof:

X Yes _ No

S/A John Trevino illegible
Signature of Affiant

Sworn to before me, and subscribed in my presence,

8/17/93 at McAllen, Texas
Date City and State

Peter E. Ormsby, /s/ Peter E. Ormsby
U.S. Magistrate Signature of
Name and Title of Judicial Officer
Judicial Officer

[Attachment A – Map Omitted In Printing]

ATTACHMENT " B "

1. All documents reflecting receipts/disbursement of money from or on behalf of Raul VALLADARES SR. to Mario SALINAS.

2. All documents relating to the acquisition and transfer of a 1984 Chevrolet Pick-up Truck by Mario SALINAS.

3. His and hers Black and gold " RADO " watch sets given by Homero BELTRAN to Mario SALINAS and his wife.

4. Personal address/telephone books, rolodexes or papers which reflect names, addresses and/or telephone numbers of associates for Mario SALINAS.

5. Proceeds and articles of personal property obtained from assisting in the laundering of illegal drug proceeds and providing special treatment for inmates at the Hidalgo County Jail, including U.S. currency, artwork, precious metals and stones, jewelry, loan documents, real estate documents, negotiable instruments and financial instruments including stocks and bonds which were obtained from assisting in the laundering of illegal drug proceeds and providing special treatment for inmates at the Hidalgo County Jail.

6. Articles of personal property evidencing the obtaining, secreting, transfer, expenditure, and/or concealment of money and assets derived from assisting in the laundering of illegal drug proceeds and providing special treatment for inmates at the Hidalgo County Jail for the last three years including books, receipts, bank statements and records, business records, financial statements, money drafts, investment brokerage statements and records, money order and cashier's checks receipts, passbooks, bank checks, safes and

records of safety deposit boxes, loan documents, real estate documents and storage lockers.

AFFIDAVIT

I, John A. Trevino, Special Agent of the Internal Revenue Service, Criminal Investigation Division, being duly sworn, deposes and says:

That I am a Special Agent of the Internal Revenue Service, Criminal Investigation Division, and have been a Special Agent for the past six years. In my capacity as a Special Agent, I Investigate criminal and civil violations of the Internal Revenue Code. I have received specialized training in the enforcement of laws concerning financial crimes as found in Title 18 and 26, United States Code. During these six years your affiant has been involved in numerous investigations of individuals who derive substantial income from unlawful activities, including the importation, manufacturing, cultivation, distribution and sale of illegal controlled substances. In addition, your affiant has extensive experience in the execution of financial search warrants, narcotic search warrants, debriefing of defendants, participant witnesses, informants, and other persons who have personal knowledge of the amassing, spending, converting, transporting, distributing, laundering, and concealing of unlawful activities.

Based on information I have received, I believe that there is probable cause to believe that within the premises of

the personal residence of Mario SALINAS being described as a one story brown brick residence, located at #74 Sante Fe, Edinburg, Hidalgo

County Texas. For photograph of location and driving instructions see Attachment "A",

those items described in Attachment "B" are concealed.

Listed in the Application and Affidavit for Search Warrant are those items which are set forth in Attachment "B", attached, which constitute evidence of violations of Title 18, United States Code, Sections 666, 1956, 1957, 1962, 1963. The source of your Affiant's information and the grounds for his belief are as follows:

Based on my training, experience, and participation in financial investigations (including this investigation) involving trafficking of large amounts of marijuana, cocaine and heroin, and tracing the proceeds gained by marijuana, cocaine, and heroin traffickers, and money launders I know:

Illegible and through experience I know that documents pertaining to these crimes are found in drug traffickers and money launders vehicles, houses, offices, and in other property owned or controlled by them. JT

a. marijuana, cocaine, and heroin traffickers, very often place assets in other names and in the names of corporate entities to avoid detection and seizure of those assets by law enforcement officers;

b. that even though these assets are in other person's names, the drug traffickers actually own and continue to use these assets and exercise dominion and control over them;

c. that large-scale drug traffickers maintain on hand large amounts of U.S. Currency in order to maintain and finance their on-going drug business;

d. that drug traffickers maintain books, records, receipts, notes, ledgers, airline tickets, money orders and other papers relating to the importation, transportation, ordering, sale, purchase and distribution of controlled substances; that the aforementioned books, records, receipts, notes, ledgers, etc., are maintained where the drug traffickers have ready access to them such as in residence and places of business;

e. that it is common for large scale drug traffickers to secret contraband, proceeds of drug sales, to include jewelry and records of drug transactions in secure locations for ready access and concealment from law enforcement authorities;

f. that persons involved in drug trafficking conceal in their residents and other secure locations, with ease of assess, caches of drugs, large amounts of currency, financial instruments, precious metals, jewelry, and other items of value and/or proceeds of drug transactions; and evidence of financial transactions relating to obtaining, transferring, secreting, or spending of large sums of money from engaging in drug trafficking activities;

g. that when drug traffickers amass large proceeds from the sale of drugs, they then attempt to legitimize these profits. That to accomplish these goals, drug traffickers utilize, including but not limited to, foreign and domestic banks and their attendant services, securities, cashier's checks, money drafts, letters of credit, shell corporations, business fronts and attorneys' services to acquire and conceal expensive assets purchased with proceeds from narcotics trafficking;

The following paragraphs are furnished to establish probable cause in support of a document search warrant.

I have personally participated in the investigation of HOMERO BELTRAN and BRIGIDO MARMOLEJO JR., the Sheriff for the County of Hidalgo, Texas, with other law enforcement officers and the investigation is being coordinated with investigations being conducted by various law enforcement agencies in Texas and in other states. Based on these investigations, my own experience in the investigation, investigative reports, seizures, debriefings and observations made by other participating agents and law enforcement officers, and from interviews with Confidential Sources (CS-1 & CS-2) conducted on July 7 & 8, 1993, I know that several employees of the Hidalgo County Jail, including the Sheriff, BRIGIDO MARMOLEJO JR., accepted bribes in exchange for special favors and privileges received by HOMERO BELTRAN, a former inmate at the jail. I also know from interviews with CS-3 that Bridigo MARMOLEJO JR. assisted Homero BELTRAN in the proposed sale of a property that Homero BELTRAN had hidden in a nominee name. CS-1 was a large scale drug trafficker who has been caught, pled guilty, admitted his guilt and is providing information to law enforcement. CS-2 has intimate knowledge of the facts surrounding the relationship between BELTRAN and MARMOLEJO.

Based on your affiant's knowledge of the investigation and years of experience, your affiant believes CS-1, CS-2 and CS-3 are both credible and reliable for the following reasons:

CS-1 has provided information of drug traffickers operating in the South Texas area to law enforcement agents and to your affiant for the past two years which has been verified by independent investigation. CS-1 has also provided information about Homero BELTRAN receiving special privileges and visits at the Hidalgo County Jail, as corroborated by CS-2, CS-3 and by testimony of a witness before the Federal Grand Jury in McAllen, Texas. CS-1 has also provided information that Homero BELTRAN gave a 1989 Pontiac Trans-Am to Brigido MARMOLEJO JR., which has been independently corroborated by a record check with the Texas Department of Motor Vehicles and by statements made to law enforcement officers participating in this investigation by the current owner of the vehicle that Brigido MARMOLEJO JR. was the former owner of the vehicle. CS-1 provided information as to the ownership of real estate by a convicted drug trafficker, Homero BELTRAN, and that Brigido MARMOLEJO JR. was involved in the proposed sale of that property, which has been corroborated by CS-3.

CS-2 has provided information about Homero BELTRAN receiving special privileges and visits at the Hidalgo County Jail as corroborated by CS-1, CS-3 and a testimony of a witness before the Federal Grand Jury in McAllen, Texas. CS-2 has also provided information that Homero BELTRAN gave Brigido MARMOLEJO JR. a 1989 Pontiac Trans-Am which was independently corroborated by a record check with the Texas Department of Motor Vehicles and by statements made to law enforcement officers participating in this investigation by the current owner of the vehicle that Brigido MARMOLEJC JR. was the former owner of the vehicle. CS-2 has also provided

information as to the ownership of real estate by a convicted drug trafficker, Homero BELTRAN, and that Brigido MARMOLEJO JR. was involved in the proposed sale of the property, which has been corroborated by CS-3. CS-2 has also provided information about drug traffickers operating in the South Texas area, specifically Michael HAMAKER, who was a fugitive in a Federal indictment originating from Houston, Texas, and who has recently been captured. CS-2's information has proven to be valuable in the identification of the Mexican source of supply of marijuana and other members of that organization.

CS-3 has provided information to your affiant and other law enforcement officers for the past three months as to the ownership of real estate by a convicted drug trafficker, Homero BELTRAN, and that Brigido MARMOLEJO JR. was involved in the proposed sale of the property, which has been corroborated by CS-1, CS-2 and independent investigation by your affiant and special agents assigned to the DEA OCDETF group in McAllen, Texas. CS-3 has also provided information about Homero BELTRAN receiving special privileges and visits at the Hidalgo County Jail, as corroborated by CS-1, CS-2 and by testimony of a witness before the Federal Grand Jury in McAllen, Texas.

BELTRAN is a convicted marijuana trafficker whose organization imported thousands of pounds of marijuana into the United States from 1984 through 1991 from Mexico. I desire to keep said confidential sources anonymous because the confidential sources have requested me to do so, because it is my experience that informants suffer physical, social and emotional retribution when their identities are revealed, because it is my experience that to

reveal the identity of such sources seriously impairs their utility to law enforcement, and because it is my experience that revealing such informants identities prevents other citizens from disclosing confidential information about criminal activities to law officers. The following paragraphs will chronicle the events pertaining to information gained by CS-1, CS-2, and CS-3 concerning BRIGIDO MARMOLEJO JR., specifically with his relationship with HOMERO BELTRAN.

After Homero BELTRAN's arrest in April 1991, Homero BELTRAN was moved in June 1991 from San Diego, California to the Hidalgo County Jail in Edinburg, Texas. CS-1 related that by September 1991, Homero BELTRAN had been receiving special privileges inside the jail after he had established an agreement with an employee at the jail named " ZAVALA ". ZAVALA allowed Homero BELTRAN to receive contact visits with his wife and family in exchange for money and dried meats.

Brigido MARMOLEJO JR. arranged to meet Homero BELTRAN and reached an agreement to increase the frequency and duration of the visits with Homero BELTRAN's family. Homero BELTRAN was to initially pay Brigido MARMOLEJO JR. $5,000 per month for having 1½ hour visit with his wife and ½ hour visits with his children. The visits at first were in the jail infirmary. Homero BELTRAN would get at least one visit per week, upon the approval of Brigido MARMOLEJO JR..

CS-1 was aware Homero BELTRAN didn't like the arrangement with Brigido MARMOLEJO JR. once it got going. Homero BELTRAN felt he was being shorted and not getting much for his money. Homero BELTRAN

changed his agreement with Brigido MARMOLEJO JR. for Homero BELTRAN to pay $5,000 a month and $1,000 per visit. Visit dates were Saturday, Sunday and Wednesday, usually late in the afternoon, with Homero BELTRAN getting usually about three visits a week. Homero BELTRAN received the money to pay Brigido MARMOLEJO JR. from his brother in law, Juan Antonio GUARDADO. CS-1 is aware Brigido MARMOLEJO JR. received bribe money directly from Homero BELTRAN on at least four occasions. CS-2 related that arrangements for the visits and payments to Brigido MARMOLEJO JR. were usually taken care of by Juan Antonio GUARDADO. Juan Antonio GUARDADO usually paid Brigido MARMOLEJO JR. prior to the visits by Homero BELTRAN's family.

The jail guards started bringing Homero BELTRAN to the jail library for the visits, where Homero BELTRAN would meet with his family. Brigido MARMOLEJO JR.'s personal office was later used, with Brigido MARMOLEJO JR. guarding the door. Mario SALINAS, the chief jailer, would guard the door, if Brigido MARMOLEJO JR. couldn't guard it. Homero BELTRAN was not handcuffed during these visits. CS-2 recalled that the last name of one of the jailers who brought Homero BELTRAN to Brigido MARMOLEJO JR.'s office was " FLORES ". CS-1 and CS-2 recall FLORES had a speech problem and studdered. On several occasions no jail personnel guarded the door to the office while Homero BELTRAN had his conjugal visit. CS-1 and CS-2 observed on several occasions Mario Salinas guarding the door to Brigido Marmolejo's office. JT

CS-1 related Brigido MARMOLEJO JR. also allowed Homero BELTRAN to bring in his girl-friend for contact visits. Homero BELTRAN's girl-friend got pregnant by him during this time, but miscarried the baby. These conjugal visits were also made in Brigido MARMOLEJO JR.'s office.

The family and contact visits continued until Homero BELTRAN was moved to Memphis Federal Prison on about March 1992. The bribe payments to Brigido MARMOLEJO JR. are estimated by CS-1 and CS-2 for this timeframe to be in excess of $100,000.

According to CS-2, Homero BELTRAN was brought back to the Hidalgo County Jail sometime in the latter part of 1992. The same arrangement was made with Brigido MARMOLEJO JR. prior to Homero BELTRAN arriving at the jail for continued special treatment.

CS-1 is aware of several other inmates at the Hidalgo County Jail who were also receiving special privileges. Eleazar MORIN and Raul VALLADARES were receiving special favors there at the jail, which included conjugal visits. According to CS-1 VALLADARES was seen frequently leaving his jail cell for extended periods of time during non-visitation hours.

Additionally CS-2 advised in approximately January 1992, Homero BELTRAN had his brother in law, Juan Antonio GUARDADO, purchase a 1989 Pontiac Trans-Am. Homero BELTRAN, no longer wanting the vehicle, asked Brigido MARMOLEJO JR. if he wanted it in lieu of the $5,000 monthly payment. Brigido MARMOLEJO JR. accepted the vehicle and gave the vehicle to his daughter who recently married. The vehicle was previously titled

to Alberto MANZANAREZ. Independent investigation by law enforcement agents has revealed the Pontiac Trans-Am was traded-in to Bert Ogden Motors in Edinburg, Texas, and that Brigido MARMOLEJO JR. was the former owner of the vehicle.

According to CS-2, in December 1991, Juan Antonio GUARDADO gave a 1984 Chevrolet pick-up truck to Mario SALINAS. The truck was red in color and had been registered to German Guzman GONZALEZ.

CS-2 knows Homero BELTRAN, as part of his special privileges, was able to have a party in jail with his family on October 29, 1992. There was a lot of food that had been brought in by Homero BELTRAN's family and some of jailers got some of the food.

CS-1 and CS-2 advised that during the Christmas season 1992, Homero BELTRAN directed Juan Antonio GUARDADO to go to M & R Jewelers and purchase four sets of watches for him to give as gifts to Brigido MARMOLEJO JR., Mario SALINAS and their wives. Two of the captains in the jail area and their wives received the other two watch sets. The total costs for the watches was approximately $9,000.

CS-2 advised that Juan Antonio GUARDADO placed phone calls to a cellular phone Brigido MARMOLEJO JR. had in his county assigned vehicle. These calls were made when GUARDADO could not reach Brigido MARMOLEJO JR. at the Sheriff's office. Independent investigation has revealed Brigido MARMOLEJO JR. has utilized his cellular phone with the phone number (210) 330-9707, to facilitate arranging meetings with Juan Antonio GUARDADO.

In the beginning of 1993, Brigido MARMOLEJO JR. was building a pavilion at his ranch located north of Edinburg, Texas. Brigido MARMOLEJO JR. wanted the pavilion completed in time to have a wedding reception for his daughter in it. According to CS-1 and CS-2, Brigido MARMOLEJO JR. was short on money to complete the pavilion. Homero BELTRAN helped Brigido MARMOLEJO JR. out and gave him $11,000 towards the completion of the pavilion. The money was given to Brigido MARMOLEJO JR. in several installments. A portion of the payment to Brigido MARMOLEJO JR. was currency that was due to Brigido MARMOLEJO JR. for his monthly $5,000 bribe from Homero BELTRAN.

CS-2 was present when Brigido MARMOLEJO JR. had taken Mario SALINAS to his ranch and showed him the pavilion. Brigido MARMOLEJO JR. stated that "if it was not for Homero BELTRAN, I wouldn't have the pavilion".

In January or February 1993, CS-2 related that Brigido MARMOLEJO JR. was worried that DEA was watching the jail. Brigido MARMOLEJO JR. suspended visits for Homero BELTRAN for a week.

CS-1 advised that Homero BELTRAN in 1987 and 1988 had loaned Baudelio TREVINO approximately $400,000 to get his produce business going known as "VALLEY BANANA KING". VALLEY BANANA KING then started its operation in Hidalgo County. TREVINO used some of that money to buy property where a produce shed is located. TREVINO was to pay Homero BELTRAN 1½% interest for the borrowed funds. The funds loaned to Baudelio TREVINO were from illegal drug proceeds Homero BELTRAN had earned from drug trafficking. The

property was being leased to another party and TREVINO was paying Homero BELTRAN from those funds. Homero BELTRAN told Brigido MARMOLEJO JR. how he came about owning a produce shed near Edinburg, Texas, explaining that the property was hidden in the name of his uncle, Heliodoro TREVINO. When Homero BELTRAN first told Brigido MARMOLEJO JR. about wanting to sell the property, Homero BELTRAN told Brigido MARMOLEJO JR. that he would help him out if Brigido MARMOLEJO JR. helped him.

Sometime in March 1993, according to CS-3, who has personal knowledge of the events surrounding the sale of the produce shed and has proven to be credible, Brigido MARMOLEJO JR. took Juan Antonio GUARDADO to the produce shed and talked to the person who was leasing the shed. Brigido MARMOLEJO JR. collected the rent for that month from Joe GARCIA, the lessee. The check was made out to Brigido MARMOLEJO JR. Jose GARCIA was informed by Brigido MARMOLEJO JR. that the owner wanted to sell the property and asked GARCIA if he was interested in buying it. GARCIA told Brigido MARMOLEJO JR. he wanted to buy the property.

As related by CS-1, Homero BELTRAN was informed that GARCIA was interested in buying the property by Brigido MARMOLEJO JR. Sometime in March or April 1993, Brigido MARMOLEJO JR. arranged for GARCIA to meet Homero BELTRAN at the jail. The meeting took place with Homero BELTRAN telling GARCIA the terms he wanted. Brigido MARMOLEJO JR. was present during this meeting. It was agreed between GARCIA and Homero BELTRAN that a value was needed in order for an agreement to be reached. Brigido MARMOLEJO JR.

told them he would arrange to get an appraisal for the property. Homero BELTRAN offered Brigido MARMOLEJO JR. $20,000 for helping him in selling the property and Brigido MARMOLEJO JR. agreed on the amount of the commission.

According to CS-1 and CS-3, Brigido MARMOLEJO JR. collected the April rent check from Joe GARCIA. Of the $6,000 in rents collected by Brigido MARMOLEJO JR. for the two months, $5,000 was kept by him and was applied to what was owed to Brigido MARMOLEJO JR. for his monthly bribe payment. The cashing of the two rent checks made out to Brigido MARMOLEJO JR. has been independently corroborated by your affiant. Brigido MARMOLEJO JR. arranged another meeting between Homero BELTRAN and Jose GARCIA at the jail several weeks after the initial meeting. At the meeting in the jail with Homero BELTRAN, Brigido MARMOLEJO JR. informed both Jose GARCIA and Homero BELTRAN what value the appraiser had reached. An agreement was reached as to the terms of the sale. Homero BELTRAN told GARCIA that the property was not titled in his name and that Homero BELTRAN's uncle, Heliodoro TREVINO, would have to come from Mexico to sign the papers.

CS-2 related that in late May 1993, Brigido MARMOLEJO JR. along with Jesus (Chuy) GUERRERO had a meeting with Juan Antonio GUARDADO at the Holiday Inn, near the airport in McAllen. The sale of the produce shed was discussed. Homero BELTRAN's uncle, Heliodoro TREVINO, was supposed to also be at the meeting, but he did not show up. It was understood between Brigido MARMOLEJO JR. and GUARDADO that Joe GARCIA's down-

payment was suppose to be paid in currency. Brigido MARMOLEJO JR. would take the $50,000 down-payment from GARCIA when the deal was ready to close. The closure of the real estate deal was delayed because Heliodoro TREVINO was not available to sign the closing documents.

According to CS-2, Brigido MARMOLEJO JR. set up a meeting with Juan Antonio GUARDADO in Miguel Aleman, Mexico. Also present at the meeting was Chuy GUERRERO. Brigido MARMOLEJO JR. accused Homero BELTRAN of talking to federal agents about him. GUARDADO told Brigido MARMOLEJO JR. that Homero BELTRAN was not talking about him and not to worry about Homero BELTRAN. Brigido MARMOLEJO JR. told GUARDADO that the grand jury was investigating his chief jailor Mario SALINAS. The grand jury was looking into a $1,500 payment that SALINAS received for special privileges he provided to an inmate at the jail. Brigido MARMOLEJO JR. was visibly upset about the investigation of Mario SALINAS and commented to GUARDADO that he had not eaten in two days. GUERRERO had two receipts which Brigido MARMOLEJO JR. wanted GUARDADO to sign. The receipts were for the rent Brigido MARMOLEJO JR. had collected from Joe GARCIA, the tenant at the produce shed. The receipts were not dated and they were small pieces of paper. Both receipts were written in English and GUARDADO completed them in Spanish. Brigido MARMOLEJO JR. made a statement to GUARDADO that he has always received money from GUARDADO, and that he never received money from Homero BELTRAN. Brigido MARMOLEJO JR.

requested a response from GUARDADO and GUARDADO said "yes" Brigido MARMOLEJO JR. was correct. Also at the meeting in Miguel Aleman, Mexico, GUARDADO brought up the impending sale of the produce shed. Brigido MARMOLEJO JR. responded by telling GUARDADO he didn't want anything to do with that property. Brigido MARMOLEJO JR. commented to GUARDADO that federal agents had gone by to see the person renting the produce shed and talked to the renter about the rent checks.

CS-2 related Brigido MARMOLEJO JR. later met Juan Antonio GUARDADO in Rio Bravo, Mexico on about June 30, 1993. Brigido MARMOLEJO JR. appeared to be very nervous and discussed with GUARDADO about an investigation that was being conducted on him. GUARDADO told Brigido MARMOLEJO JR. that all the attention over Homero BELTRAN was being focused on the arrest of Michael HAMAKER and Brigido MARMOLEJO JR. should not be so concerned about Homero BELTRAN talking to law enforcement about him. Brigido MARMOLEJO JR. told GUARDADO that the wedding of his daughter cost him a lot of money and he also needed money because of had [sic] some legal problems that he had. Brigido MARMOLEJO JR. requested $10,000 from GUARDADO. GUARDADO told Brigido MARMOLEJO JR. he could give him the money, and he would try to get together with Brigido MARMOLEJO JR. as soon as possible. GUARDADO also mentioned to Brigido MARMOLEJO JR. about the jail escape of Raul VALLADARES and VALLADARES being in Mexico. Brigido MARMOLEJO

JR. made the statement that if GUARDADO saw VALLADARES tell him he still owes Brigido MARMOLEJO JR. $350,000.

CS-1 advised that Chuy GUERRERO recently went to the Starr County Jail in Rio Grande City and saw Homero BELTRAN. Sometime in late April 1993, Homero BELTRAN was moved by the U.S. Marshals Service to the Starr County Jail in Rio Grande City, Texas. GUERRERO asked Homero BELTRAN about the $10,000 that Brigido MARMOLEJO JR. wanted. GUERRERO also told Homero BELTRAN not to talk about Brigido MARMOLEJO JR. to federal agents.

Several phone conversations between CS-3 and Brigido MARMOLEJO JR. have been recorded under the supervision of the OCDETF group in McAllen, Texas. Your affiant participated in the recording of these phone conversations. The following is a summary of these recorded conversations.

On May 4, 1993, CS-3 called Brigido MARMOLEJO JR. and asked him what was going on with the sale of the property. CS-3 told Brigido MARMOLEJO JR. he had not heard anything from the sellers of the property. Brigido MARMOLEJO JR. told CS-3 that he had recently seen "TONIO" at the Holiday Inn. Brigido MARMOLEJO JR. mentioned that the person who needed to sign the papers did not show up with "TONIO". Brigido MARMOLEJO JR. made mention that maybe they were scared and hiding out. Brigido MARMOLEJO JR. told CS-3 he was expecting to hear from the sellers.

On May 21, 1993, another phone conversation was recorded with CS-3 and Brigido MARMOLEJO JR. CS-3

asked Brigido MARMOLEJO JR. who was going to collect the rent for the produce shed and if Brigido MARMOLEJO JR. had heard anything from the sellers.

Brigido MARMOLEJO JR. stated he really was not involved in the deal anymore. Brigido MARMOLEJO JR. told CS-3 he could try to see if he had a phone number for CS-3 in order for him to get in contact with the sellers. Within a few minutes CS-3 received a phone call from "TONIO" calling from Monterey, Mexico. "TONIO" mentioned he had just heard from the "Sheriff". "TONIO" wanted to find out if the money was ready. CS-3 explained the papers were with the attorney and would need to be signed by the seller. "TONIO" told CS-3 the seller was unable to come across at this time to sign the documents.

On July 15 & 19, 1993, the OCDETF group of the DEA in McAllen, Texas, conducted a under-cover operation involving Brigido MARMOLEJO JR. Taped conversations with Brigido MARMOLEJO JR. and CS-2 were made on these dates. The conversations between Brigido MARMOLEJO JR. and CS-2 were in Spanish and have been translated to English with the aid of CS-2. The following is a summary of these taped conversations.

On the conversation on July 15, 1993, Brigido MARMOLEJO JR. acknowledged his participation in the sale of the produce shed with Homero BELTRAN and Jose GARCIA. Brigido MARMOLEJO JR. stated he had been in the meeting with Homero BELTRAN and Jose GARCIA at the jail when the real estate deal was being discussed. Brigido MARMOLEJO JR. also acknowledged the existence of the agreement for the $20,000 commission he was to receive

for finding a buyer for the produce shed. Brigido MARMOLEJO JR. also stated he had sent his "compadre" to Jose GARCIA to get the dates on the rent checks which he had collected for Homero BELTRAN. Brigido MARMOLEJO JR. wanted to complete the receipts which he had previously had Juan Antonio GUARDADO sign in Miguel Aleman, Mexico.

Also on the July 15th tape recording Brigido MARMOLEJO JR. was made aware that another individual who had been recently arrested maybe coming to his jail. CS-2 asked Brigido MARMOLEJO JR. if he could make sure this individual was made comfortable if he made it to his jail. Brigido MARMOLEJO JR. responded he would be able to take care of him. However, Brigido MARMOLEJO JR. was concerned that no-one find out about this agreement. Brigido MARMOLEJO JR. was also asked by CS-2 if he could call the Sheriff in Starr County in order to solicit special privileges for Homero BELTRAN at the jail. Brigido MARMOLEJO JR. responded he would call "the man" from Rio Grande, and "the worst he can say is no".

Regarding the jail escape by Raul VALLADARES from the Hidalgo County Jail in April 1993, Brigido MARMOLEJO JR. told CS-2 that a person involved in breaking out VALLADARES had been killed. Brigido MARMOLEJO JR. stated VALLADARES had some of the guys that helped him break out killed. Brigido MARMOLEJO JR. also made reference to "the person who had the gun", receiving $15,000 for his part in the escape.

Brigido MARMOLEJO JR. was also asked about the "white car" he had gotten from Homero BELTRAN. Brigido MARMOLEJO JR.'s response was "No, lets not talk about it".

Brigido MARMOLEJO JR. on July 15, 1993, received from CS-2 $3,000 in U.S. currency as partial payment towards the $10,000 Brigido MARMOLEJO JR. was expecting.

On the under-cover recording conducted on July 19, 1993, Brigido MARMOLEJO JR. received from CS-2 $7,000 in U.S. currency. In this recording Brigido MARMOLEJO JR. again brings up the two receipts he wants Juan Antonio GUARDADO to complete in his own hand-writing. Brigido MARMOLEJO JR. now has the dates from the rent checks and wants GUARDADO to fill in the dates. Brigido MARMOLEJO JR. was concerned that in an investigation regarding the produce shed property the question will asked [sic] why he received the rent in his name. With the completed receipts Brigido MARMOLEJO JR. stated "they can't nail me". Part of this conversation took place in Brigido MARMOLEJO's office at the jail, where the receipts were last seen by CS-2.

Additionally on the July 19th tape recording Brigido MARMOLEJO JR. tells CS-2 he went beyond his budget on his daughter's wedding and spent too much money.

Brigido MARMOLEJO JR. continued by acknowledging he knew what was going on with the Federal Grand Jury which was looking into the jail escape by Raul VALLADARES. Brigido MARMOLEJO JR. stated an employee of his had testified before the grand jury that certain prisoners were receiving special privileges. Brigido MARMOLEJO JR. further stated he was not supposed to know

this information. Brigido MARMOLEJO JR. remarked that "what I do know is what has occurred between Homer and I has not come up", and "as long as only we know about it, they can't screw us". CS-2 asked Brigido MARMOLEJO JR. why Mario SALINAS was being investigated by the grand jury and Brigido MARMOLEJO JR. responded because of a letter that dumped on MARIO and the "STUTTERER".

DEA Special Agent Alan Tittle who has worked with AUSA Greg Surovic on the escape of Raul VALLADARES SR. from the Hidalgo County Jail, informed me that the day after VALLADARES escaped the U.S. Marshall's Service executed a search warrant at VALLADARES' residence. The search warrant was executed on April 19, 1993, at Route 2, Box 144RH, McAllen, Texas. In the search, a letter was found in VALLADARES' office on top of his desk. The letter, written from Raul VALLADARES SR., instructs Juan Antonio SALAZAR to give Edelmiro FLORES envelopes containing $1,500 and $500. The $500 envelope was intended for FLORES, and the other envelope FLORES was to pass on to a person designated on the envelope as "M". A separate envelope containing $1,500 was supposed to be delivered to Mario SALINAS by Juan Antonio SALAZAR. The money in the envelope was currency. In the letter VALLADARES describes Edelmiro FLORES as the tall guard and that he "stutters". The money given to Mario SALINAS was supposed to be for his campaign, but FLORES was not supposed to know SALINAS received the money and vice versa. Testimony by witnesses provided to the Federal Grand Jury investigating the jail escape by Raul VALLADARES corroborates that these instructions to Juan Antonio SALAZAR were

carried out. Your affiant was advised by Special Agent Neoe Dominquez has through personal knowledge and conversations with Mario Salinas has Salina's residence to be #74 Santa Fe, Edinburgh, Texas. JT

This affidavit has been reviewed by Assistant U.S. Attorney Greg Surovic.

DATED: 8/14/93

/s/ John A. Trevino
JOHN A. TREVINO, Special Agent Internal Revenue Service Criminal Investigation Division

Subscribed and Sworn to before me
this 17th day of August, 1993.

/s/ Peter E. Ormsby
Honorable Peter E. Ormsby
UNITED STATES MAGISTRATE

Supreme Court, U.S.
FILED
JAN 13 1997

No. 96-738

In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIO SALINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a jailor's receipt of bribes from a prisoner in return for allowing conjugal visits at the jail, when that jail receives federal funds pursuant to a contract to reimburse the jail for the cost of housing federal prisoners, violates 18 U.S.C. 666(a)(1)(B).

2. Whether the RICO conspiracy statute, 18 U.S.C. 1962(c), requires proof that the defendant agreed personally to commit two predicate acts of racketeering.

3. Whether there was probable cause to support the search warrant executed at petitioner's home.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 89 F.3d 1185.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1996. A petition for rehearing was denied on August 15, 1996. Pet. App. 48. The petition for a writ of certiorari was filed on November 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner

was convicted on one count of conspiracy to conduct the affairs of an enterprise through a pattern of racketeering activity (RICO conspiracy), in violation of 18 U.S.C. 1962(c), and two counts of bribery relating to a program receiving more than $10,000 in federal funds, in violation of 18 U.S.C. 666(a)(1)(B). Petitioner was sentenced to 36 months' imprisonment, to be followed by three years supervised release; he was also fined $5,000. The court of appeals affirmed.

1. At the relevant times, petitioner was the Divisional Chief for Detention of the Hidalgo County, Texas, Sheriff's Office. His co-defendant, Brigido Marmolejo, Jr., was the Sheriff of Hidalgo County, and was responsible for the operation of the Hidalgo County Jail. The Hidalgo County Jail was constructed and improved with an $850,000 federal grant issued pursuant to a grant contract executed in May 1984, under which the County agreed to house federal prisoners in the completed facility for the United States Marshals Service. See Pet. App. 4-6.

The agreement between the federal government and the County was authorized by 18 U.S.C. 4002, which establishes a federal program for providing "suitable quarters for the safekeeping, care, and subsistence" of persons held in custody under federal law. As a condition of receiving federal funds for jail construction, the County agreed that it would, from time to time, provide detention space for federal prisoners. Pet. App. 6. A secondary agreement established specific provisions for the County's housing of federal prisoners, including the compensation to be paid to the County. *Id.* at 6, 59-68. Under that agreement, it was estimated that the federal government would pay the County $915,000 annually for housing federal prisoners. *Id.* at 60.

The rules of the Hidalgo County Jail did not permit conjugal visits. Family contact visits were limited to 30 minutes and ordinarily took place in the attorney visitation room, the booking area, or the detention squad room; those visits were subject to observation by jail guards. Under jail policy, if an ordinary contact visit became too physically intimate, the jailors would, after a warning, terminate the visit. Gov't C.A. Br. 5-6.

2. Homero Beltran-Aguirre (Beltran) was a federal prisoner housed in the Hidalgo County Jail (Jail) pursuant to the County's agreement with the Federal government. Beltran was transferred to the Jail on June 7, 1991, and remained there until April 14, 1992, when he was transferred to another federal facility. Beltran returned to the Jail on November 6, 1992, and remained there until April 26, 1993. Pet. App. 2.

In late August or early September 1991, Sheriff Marmolejo and Beltran arranged for a series of bribes whereby Beltran would pay to be permitted to have conjugal visits with his wife. Beltran agreed to pay Marmolejo a fixed rate of $6,000 per month, and also $1,000 for each conjugal visit. The conjugal visits occurred two days a week during the period in which Beltran was incarcerated at the Jail. Several of the visits occurred in Sheriff Marmolejo's office; either petitioner or Marmolejo himself stood outside while they were taking place. Gov't C.A. Br. 7-8.

In January 1992, Beltran instructed his brother-in-law to purchase four pairs of men's and women's Rado watches. The watches cost Beltran approximately $8,500. Beltran gave Marmolejo and petitioner each a pair of watches. On another occasion, Beltran's brother-in-law gave petitioner a 1984 Chevrolet

Silverado pickup, valued at $3,000-$4,000. Gov't C.A. Br. 9-10.

Pursuant to a search warrant, federal agents searched petitioner's house, and seized the pair of Rado watches given to petitioner by Beltran. Before trial, the district court rejected petitioner's motion to suppress the watches, and held that the warrants were sufficiently particular and were supported by probable cause. See Pet. App. 28 n.21; Gov't C.A. Br. 18.

3. The RICO conspiracy count of the indictment, Count 2, alleged that "each defendant agreed that two or more of the acts of racketeering activity, as specified in paragraph 7 of Count One, * * * would be committed in the conduct of the affairs of the enterprise." There was no allegation that each defendant agreed personally to commit two racketeering acts. Petitioner sought a jury instruction that the jury must find that each defendant agreed personally to commit two racketeering acts. Although the government did not object to that proposed charge, the district court declined to give it, and instead instructed as follows (see Pet. App. 23-24; Gov't C.A. Br. 43):

> So what the government has to prove is that the two of these gentlemen reached an agreement with each other that they were going to run the Sheriff's Office through a pattern of racketeering acts, * * * through a system of collecting bribes from one of these prisoners in return for doing favors for him, and that each of the defendants knew that that was the idea and that each of them willfully joined in. * * * So the government, in Count Two, would have to prove to you that each

> defendant * * * knew and understood and agreed that at least two predicate acts were going to be committed and that, thereafter, each of them joined in and did something to help.

4. A divided panel of the court of appeals affirmed petitioner's convictions. Pet. App. 1-47. Judge Jolly dissented with respect to the bribery convictions. *Id.* at 37-47.

a. The court first rejected petitioner's contention that his acceptance of bribes did not fall within the reach of 18 U.S.C. 666 because the County Jail had not received "[f]ederal assistance" exceeding $10,000 in a year.[1] Petitioner contended that the federal funds received by the County Jail pursuant to its contract with the federal government to house prisoners were simply contract payments for services rendered, and not "[f]ederal assistance" within the meaning of the statute. The court noted, however, that the contract to house prisoners was "interrelated" with the federal government's grant of funds to the County for jail construction, since, "[a]s a condition to the re-

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[1] Section 666(a)(1)(B) punishes anyone who, being an agent of an organization or a state or local governmental agency,

> corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

18 U.S.C. 666(a)(1)(B). To be covered by the prohibition, the state or local government or agency must "receive[] in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b).

ceipt of this grant, Hidalgo County Jail had to guarantee that it would provide detention space for federal prisoners." Pet. App. 6-7. Accordingly, the court concluded that the grant agreement and the contract, together, constituted "[f]ederal assistance" or a "[f]ederal program" within the meaning of Section 666(b). Pet. App. 7.

The court also concluded that, even with respect to the contract payments alone, petitioner's argument that the funds for housing prisoners were not "[f]ederal assistance" must fail. The court noted that the purpose of Section 666 is to protect the integrity of federal programs for which there is a "specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." Pet. App. 8 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 370 (1983)). Because the funds provided by the federal government in this case were intended to fulfill the government's policy of providing for the safekeeping and care of prisoners in federal custody, it was irrelevant, the court concluded, that the government received something in return for the assistance it provided to the County. Pet. App. 9.

b. The court also rejected petitioner's argument that their operation of the County Jail to allow Beltran to have conjugal visits did not involve "anything of value of $5,000 or more," as required by Section 666(a)(1)(B). The court noted, first, that under circuit precedent, Section 666(a)(1)(B) "does not require the government to prove that federal funds were directly involved in a bribery transaction, or that the federal monies funded the corrupt transaction." Pet. App. 10-11. It also noted that the term "anything of value" is "broad in scope and contains no language restricting its application to transactions involving money,

goods, or services." *Id.* at 11. The court therefore concluded that the term includes "transactions involving intangible items, such as the conjugal visits at issue in this case." *Ibid.* "Because the conduct in this case involves serious acts of bribery by agents of a local government who were carrying out their duties under a Federal program," the court stated, "this case is within the scope of conduct Congress intended to encompass within 18 U.S.C. § 666." Pet. App. 14.

The court noted that "[t]he transactions involved something of value—conjugal visits that Beltran was willing to pay for." Pet. App. 16. And, because Beltran was willing to pay more than $5,000 to obtain conjugal visits, the court also found no difficulty in concluding that the visits were worth more than $5,000. The court reached that conclusion "in the same way an appraiser would value an asset—by looking at how much a person in the market would be willing to pay for [the visits]." *Id.* at 17-18.

c. The court further rejected petitioner's contention that the trial judge erred in instructing the jury on the RICO conspiracy count. Pet. App. 21-26. The court noted that previous Fifth Circuit cases had not definitively resolved whether "each RICO conspirator must agree to commit personally two or more racketeering acts or whether it is sufficient that the conspirator simply agrees that one of his co-conspirators will commit two or more racketeering acts." *Id.* at 22. After examining prior case law of the Fifth Circuit and other circuits, the court "join[ed] the majority view among the circuits in holding that to be guilty of RICO conspiracy, the conspirator must simply agree 'to the objective of a violation of RICO; he need not agree personally to violate the statute'" sub-

stantively by personally committing a pattern of racketeering activity. *Id.* at 24. It reasoned that nothing in the language of the RICO conspiracy provision, 18 U.S.C. 1962(d), "indicates that Congress intended to do anything more than to criminalize a conspiratorial objective—the violation of a substantive RICO provision." Pet. App. 24. To accept petitioner's argument that RICO conspiracy contains a special personal-participation element "would be a marked departure from traditional conspiracy law for which there is no support in the language of the statute or the statutory history." *Id.* at 25.

d. Finally, the court rejected petitioner's argument that the Rado watches seized from his house should be suppressed because probable cause to carry out the search was lacking. The court found that it need not reach the question of probable cause, because the searching officers had relied in good faith on a facially valid search warrant supported by a detailed affidavit containing first-hand observations by the affiant. Pet. App. 29. The court therefore ruled that the good-faith exception to the exclusionary rule applied to the evidence seized during the search of petitioner's house. *Id.* at 31.

ARGUMENT

1. Petitioner contends (Pet. 4-5) that the court of appeals' conclusion that the Hidalgo County Jail is, within the meaning of 18 U.S.C. 666(b), an "organization" that "receives" "benefits" under a "federal program" involving a "grant" or "contract" conflicts with *Logue* v. *United States*, 412 U.S. 521 (1973). That contention is without merit. The question in *Logue* was whether the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)—which imposes liability

on the United States for negligence by "any employee of the Government" (including "employees of any federal agency")—makes the United States liable for negligence by federal contractors, in that case the employees of a county jail that housed federal prisoners under a contract with the federal government. The Court concluded that the jail employees were not employees of "the Government" or of a "federal agency" within the meaning of the FTCA, even though the jail was housing federal prisoners under a contract with a federal agency. 412 U.S. at 526-532. The federal bribery statute at issue here does not require that the jail be a "federal agency," but rather that it be an "organization" that "receives" "benefits" under a "federal program" involving a "grant" or "contract." Thus, the bribery statute, unlike the FTCA, expressly encompasses actions by employees of federal contractors.

2. Petitioner also argues (Pet. 6-7) that the court of appeals' decision on the bribery counts conflicts with decisions of the Third Circuit, in *United States* v. *Cicco*, 938 F.2d 441 (1991), and of the Second Circuit, in *United States* v. *Foley*, 73 F.3d 484 (1996). That contention is incorrect.[2]

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[2] Petitioner also relies (Pet. 5) on the decision of the district court in *United States* v. *Stewart*, 727 F. Supp. 1068 (N.D. Tex. 1989). In that case, the district court concluded that the defendants could not be charged under Section 666 for stealing property valued at more than $5,000 from a company that sold more than $10,000 per year in machinery to the federal government. The court concluded that the funds paid by the federal government to the company in exchange for the tools were part of an ordinary commercial exchange, and were therefore not "benefits" within the meaning of Section 666. Whether or not *Stewart* was correctly decided, it has been

In *Cicco*, the defendants, officials of a New Jersey town, were charged under Section 666 with soliciting election-related political services from office seekers, intending to be influenced in the distribution of municipal jobs. The theory of the case was that the defendants had demanded political services, allegedly a "[]thing of value" within the meaning of Section 666(a)(1)(B), as a *quid pro quo* for providing jobs that were worth more than $5,000 per year. The difficulty that the court perceived with the government's theory was the allegation that the election-related services were a thing of value, within the statutory meaning. The court acknowledged that "specific election day services with municipal employment as the quid pro quo[] might come within the literal language of § 666," 938 F.2d at 444, but it concluded that if the statute were read broadly enough to encompass exchanges of political jobs for political favors, without any transfer of cash, the statute would be uncertain in application: "If solicitation of what the government characterizes as 'party loyalty' is covered, for example, those boundaries become vague indeed." *Ibid.*

There is no similar difficulty in this case. This case involves a simple exchange of cash by a prisoner for favorable treatment by officers of a jail receiving federal funds. Because of the straightforward nature of such a transaction, there is no difficulty in determining whether that favorable treatment is a "[]thing of value" within the meaning of Section 666(a)(1)(B).

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superseded by the decision below of the court of appeals for that circuit. Moreover, as the court of appeals explained (Pet. App. 6-7), the funds received by the County Jail in this case did not involve just funds for services rendered, for the federal government also gave the County grant assistance for the construction of the Jail.

And, in offering Beltran favorable treatment, petitioner was using facilities of the county jail that were paid for in large part by federal funds. Thus, unlike the *Cicco* case, this case does implicate "the integrity of the vast sums of money distributed through Federal programs from * * * undue influence by bribery." 938 F.2d at 444 (quoting S. Rep. No. 225, *supra*, at 370).

In *Foley*, the court of appeals reversed the conviction of a state legislator who had been charged with accepting bribes from real estate developers in exchange for influencing the passage of legislation favorable to those developers. The court concluded that the convictions could not stand because, in its view, Section 666 was enacted to safeguard the integrity of federal funds, and the legislation that resulted from the bribe "affected neither the financial interests of the [State] nor * * * federal funds directly." 73 F.3d at 492.

We believe that the decision in *Foley* is incorrect, but we also believe that it does not conflict with the decision in this case. The court in *Foley* emphasized that the legislation passed in that case "had [no] connection whatever with a federal program" for which the State was receiving federal funds. 73 F.3d at 492. This case is markedly different, for here the bribe was offered and taken in return for favorable treatment in the operation of a jail housing a federal prisoner, precisely the federal program for which the county had received federal funds. Thus, even though the bribe did not cause the operators of the jail to be influenced in the disbursement of money, it did cause them to be influenced in the administration of the very program for which they had received federal

funds. The bribes therefore directly affected the integrity of a federally funded program.[3]

3. a. Petitioner argues (Pet. 7-12) that the trial court should have instructed the jury, on the RICO conspiracy charge, that it was necessary for the government to prove that petitioner agreed personally to

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[3] In *United States* v. *Rooney*, 37 F.3d 847 (2d Cir. 1994), relied on by the court of appeals in *Foley* (see 73 F.3d at 491), the court concluded that a real estate developer, who had obtained construction loans from a federal agency, did not violate Section 666 when he requested that the general contractor perform additional work in return for his agreement to seek additional financing from the government. The court noted that "the charge against Rooney is unrelated to any dispensing of government largesse," 37 F.3d at 850, a point that distinguishes *Rooney* from this case, in which Beltran's bribes were offered for favorable treatment by his jailers. In addition, the court concluded that Rooney's offer was not "corrupt," as required by the statute, because it did not involve a breach of some duty owed to the government or the public at large. *Id.* at 852. The same cannot be said of this case, in which petitioner unquestionably allowed Beltran's bribes to influence improperly the performance of his public functions. "It is an obvious violation of duty and public trust for a public official * * * to accept or demand a personal benefit intending to be improperly influenced in one's official duties." *Ibid.*

United States v. *Wyncoop*, 11 F.3d 119 (9th Cir. 1993), cited by petitioner (Pet. 7), is also inapposite. In that case, the defendant was charged with embezzling money from a college, which received no federal funds directly but admitted students who received federally guaranteed student loans. The court concluded that the indirect benefit to the college from increased enrollment of students receiving federally guaranteed private loans was not a "benefit[] in excess of $10,000 under a Federal program" within the meaning of Section 666(b). 11 F.3d at 121. In this case, by contrast, the County received funds directly from the federal government for the construction and operation of the Jail.

commit at least two racketeering acts. He contends that it erred in charging that the government needed only to show that petitioner agreed to participate in an undertaking that, as a whole, would involve at least two racketeering acts (whether committed by petitioner or one of his co-conspirators). The court of appeals correctly rejected that challenge. Pet. App. 21-26.

The RICO conspiracy provision, 18 U.S.C. 1962(d), states that "[i]t shall be unlawful for any person to conspire to violate any of the [substantive RICO provisions]." 18 U.S.C. 1962(d). As the court of appeals observed (Pet. App. 25), traditional conspiracy doctrine provides that the conspirators need only agree and intend that a substantive provision be violated, not that each conspirator commit the violation. See *United States* v. *Neapolitan*, 791 F.2d 489, 497-498 (7th Cir.), cert. denied, 479 U.S. 939 (1986). Nothing in the language of the RICO statute or its legislative history suggests that Congress intended to depart from that longstanding doctrine, or to add any special element of proof that was not required by application of general conspiracy principles. A RICO conspiracy offense therefore occurs if there is an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity, which includes the agreement that the conspirators, as a group, will commit two or more racketeering acts constituting such a pattern. There does not need to be an agreement that each and every conspirator will commit two or more crimes comprising a pattern of racketeering activity.

Petitioner correctly notes that there is a conflict among the courts of appeals on that point, but the majority view (shared by the Fifth Circuit in this

case) is plainly correct, and there is no need for this Court to resolve the issue. A large majority of the courts of appeals have rejected the argument advanced by petitioner. See, *e.g.*, *United States* v. *Pungitore*, 910 F.2d 1084, 1130 (3d Cir. 1990), cert. denied, 500 U.S. 915 (1991); *United States* v. *Pryba*, 900 F.2d 748, 759-760 (4th Cir. 1989), cert. denied, 498 U.S. 924 (1990); *United States* v. *Hughes*, 895 F.2d 1135, 1141 (6th Cir. 1990); *United States* v. *Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993); *United States* v. *Leisure*, 844 F.2d 1347, 1367 (8th Cir.), cert. denied, 488 U.S. 932 (1988); *United States* v. *Blinder*, 10 F.3d 1468, 1477 (9th Cir. 1993); *United States* v. *Starrett*, 55 F.3d 1525, 1544 (11th Cir. 1995), cert. denied, 116 S. Ct. 1335 (1996). Only two circuits have accepted petitioner's argument. See *United States* v. *Winter*, 663 F.2d 1120, 1136-1138 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Ruggiero*, 726 F.2d 913, 921 (2d Cir.), cert. denied, 469 U.S. 831 (1984). The Tenth Circuit has tentatively applied the minority view while expressly preserving the question for reconsideration by another panel. See *United States* v. *Sanders*, 929 F.2d 1466, 1473, cert. denied, 502 U.S. 846 (1991).

The conflict in the circuits on this issue has existed for many years, and there is no need for this Court's intervention at this time. Now that the Fifth Circuit has joined the majority, the minority circuits may reexamine their position in the future. Furthermore, this Court has in the past denied several certiorari petitions presenting this issue, see *Alex* v. *United States*, 115 S. Ct. 2245 (1985); *Pryba* v. *United States*, 498 U.S. 924 (1990); *Adams* v. *United States*, 474 U.S. 971 (1985), and there is no basis for a different result now.

b. Petitioner also argues (Pet. 10-12) that the Fifth Circuit's decision in this case was a reversal of prior Fifth Circuit precedent, and that such a change in the law deprived him of due process. That due process argument was not presented to the court of appeals, and in any event it has no merit. Before this case, the Fifth Circuit had never decided whether a jury instruction such as was given in this case was proper. Although dicta in some Fifth Circuit cases had discussed the issue, none of those earlier cases actually held, as petitioner claims, that each RICO conspirator must agree to commit personally two of the racketeering acts.[4] And in view of the cases in

---

[4] See *United States* v. *Marcello*, 876 F.2d 1147, 1152-1153 (5th Cir. 1989) ("RICO conspiracy conviction requires proof that the defendants conspired to engage in a pattern of racketeering activity."); *United States* v. *Phillips*, 664 F.2d 971, 1012 (5th Cir. 1981) ("Proof of a RICO conspiracy charge requires that the Government prove the additional element of agreement. The defendant must have objectively manifested an agreement to participate directly or indirectly, in the affairs of an enterprise through the commission of two or more predicate crimes.") (emphasis added) (internal quotation marks omitted), cert. denied, 457 U.S. 1136 (1982); *United States* v. *Sutherland*, 656 F.2d 1181, 1203 (5th Cir. 1981) ("The defendants contend that the court should have instructed the jury that *each* defendant must have committed at least two predicate crimes in furtherance of the conspiracy. This argument confuses conspiracy to commit a RICO offense with the substantive RICO offense itself. The substantive crime does require each defendant to have committed at least two predicate acts of racketeering activity, but a *conspiracy* charge is based instead on an agreement to do so; to prove such an agreement, the government need only demonstrate some overt act, by any defendant, in furtherance of the agreement.") (internal quotation marks omitted), cert. denied, 455 U.S. 949 (1982); *United States* v. *Elliot*, 571 F.2d 880, 902-903 (5th Cir.

other circuits holding that no such instruction is required, petitioner could have had no reasonable reliance interest in the law of any one circuit, even if it were favorable to him. See *United States* v. *Rodgers*, 466 U.S. 475, 484 (1984). Thus, there is no merit to petitioner's argument that the court of appeals unconstitutionally applied a new standard of criminal liability to his case.

5. Finally, petitioner argues (Pet. 12-13) that because two search warrants were issued to find the Rado watches, one for his home and one for his office, neither was supported by probable cause to believe that the watches could be found in that place. The court of appeals correctly held, however, that because the officers in good faith relied on the facially valid search warrant to search petitioner's home, there was no need to reach the question whether the war-

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1978) ("[T]he object of a RICO conspiracy is to violate a substantive RICO provision—here, to conduct or participate in the affairs of an enterprise through a pattern of racketeering activity—and not merely to commit each of the predicate crimes necessary to demonstrate a pattern of racketeering activity. The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes. Under the statute, it is irrelevant that each defendant participated in the enterprise's affairs through different, even unrelated crimes, so long as we may reasonably infer that each crime was intended to further the enterprise's affairs. To find a single conspiracy, we still must look for agreement on an overall objective.") (footnote omitted), cert. denied, 439 U.S. 953 (1978).

rant was supported by probable cause.[5] See *United States* v. *Leon*, 468 U.S. 897 (1984). In any event, petitioner's contention that the warrant was not supported by probable cause is factbound and raises no issue of general importance warranting this Court's review.

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[5] The court of appeals followed its precedent to the effect that "when a warrant application is supported by more than a 'bare bones affidavit' containing wholly conclusionary statements, it is appropriate for officers to rely on the warrant's validity." *United States* v. *Pigrum*, 922 F.2d 249, 252 (5th Cir.), cert. denied, 500 U.S. 936 (1991). The affidavit in this case was far from "bare bones." See Pet. App. 86-106. The affiant, IRS Special Agent John A. Trevino, stated that he had participated personally in the investigation of prisoner Beltran and Sheriff Marmolejo. The affiant relied on information received from two (then) confidential informants, Beltran and his brother-in-law. The affidavit recited in detail the course of the bribery, specifically including the transfer of sets of watches to the Sheriff and petitioner. It was a reasonable inference that the set of watches given to petitioner might be found where he spent time and kept his personal possessions, his office and his home. Indeed, it was a reasonable possibility that the man's watch might be in his office and the woman's watch at his residence. Under the circumstances, the affidavit was sufficient to satisfy the probable cause and particularity requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JANUARY 1997

Supreme Court, U.S.
FILED
APR 7 1997
CLERK

(3)

No. 96-738

In The

Supreme Court of the United States

October Term, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

JOINT APPENDIX

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Petition For Certiorari Filed November 12, 1996
Certiorari Granted February 24, 1997

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RELEVANT DOCKET ENTRIES

APPEAL CLOSED

U.S. District Court
TXS – Southern District of Texas (McAllen)

CRIMINAL DOCKET FOR CASE #: 94-CR-10-2

USA v. Marmolejo, et al — Filed: 01/18/94
Case Assigned to: Judge George P. Kazen
Dkt# in other court: None

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Francisco J Enriquez
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Pending Counts:	Disposition
18 USC 9162(d) RICO Conspiracy (Offense Date: 7/91 to 8/93) Penalty: 20 yrs and/or $250,000 fine plus 3 yrs SRT And $50 Spec. Assess. (2)	Cts. 2-4: 36 months to serve; 3 yrs TSR and $5,000 fine. (2)
18 USC 666(a)(1)(B) & 18 USC 2 Bribery in relation to a program receiving more than $10,000 in Federal Funds (Offense Date: 10/1/91 to 4/14/92) Penalty: 10 yrs and/or $250,000 fine plus 3 yrs SRT and $50 Spec. Assess. (3)	Cts. 2-4: 36 months to serve; 3 yrs TSR and $5,000 fine. (3)

18 USC 666(a)(1)(B), 18:2 Bribery in relation to a program receiving more than $10,000 in Federal Funds (Offense Date: 10/1/91 to 7/20/93) Penalty: 10 yrs and/or $250,000 fine plus 3 yrs SRT and $50 Spec. Assess. (4)

Cts. 2-4: 36 months to serve; 3 yrs TSR and $5,000 fine. (4)

Offense Level (opening): 4

Terminated Counts: Disposition

18 USC RICO (Offense Date: 7/91 to 8/93) Penalty: 20 yrs and/or $250,000 fine plus 3 yrs SRT (1)

Acquitted by jury after trial (1)

Offense Level (disposition): 4

Complaints:

NONE

BRIGIDO NMI MARMOLEJO, JR

defendant

==========

MARIO NMI SALINAS

defendant

==========

ELOY NMI ZAVALA

defendant

==========

EDELMIRO NMI FLORES

defendant

==========

USA

plaintiff

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8/17/93	–	APPLICATION AND AFFIDAVIT for Search Warrant, filed. IRS S/A John Trevino. (mis) [Entry date 02/01/94]
8/17/93	–	Search Warrant Issued in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores by Mag Judge Peter E. Ormsby (mis) [Entry date 02/01/94]
8/17/93	–	MOTION AND ORDER GRANTING EX PARTE MOTION TO SEAL AFFIDAVITS as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 02/01/94] [Edit date 02/07/94]

8/17/93	–	Search Warrant Issued in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores by Mag Judge Peter E. Ormsby (mis) [Entry date 02/01/94]
8/17/93	–	Search Warrant Issued in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores by Mag Judge Peter E. Ormsby (mis) [Entry date 02/01/94]
8/17/93	–	Search Warrant Issued in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores by Mag Judge Peter E. Ormsby (mis) [Entry date 02/01/94]
8/19/93	–	Search Warrant Issued in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores by Mag Judge Peter E. Ormsby (mis) [Entry date 02/01/94]
8/19/93	–	AFFIDAVIT for Search Warrant, filed. (mis) [Entry date 02/01/94]
8/19/93	–	Search Warrant Returned in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 02/01/94] [Edit date 02/07/94]

8/19/93	–	AFFIDAVIT for Search Warrant, filed. (mis) [Entry date 02/01/94]
8/19/93	–	Search Warrant Returned in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 02/01/94] [Edit date 02/07/94]
8/19/93	–	AFFIDAVIT for Search Warrant, filed. (mis) [Entry date 02/01/94]
8/19/93	–	Search Warrant Issued in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores by Mag Judge Peter E. Ormsby (mis) [Entry date 02/01/94]
8/19/93	–	Search Warrant Returned in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 02/01/94] [Edit date 02/07/94]
8/19/93	–	AFFIDAVIT for Search Warrant, filed. (mis) [Entry date 02/01/94]
8/19/93	–	Search Warrant Returned in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 02/01/94] [Edit date 02/07/94]

1/18/94	1 48	INDICTMENT as to Brigido NMI Marmolejo (1) count(s) 1, 2, 3, 4, 5-7, 8, Mario NMI Salinas (2) count(s) 1, 2, 3, 4, Eloy NMI Zavala (3) count(s) 2, 3, Edelmiro NMI Flores (4) count(s) 2, 3, 4, filed. (mis) [Entry date 02/01/94]
1/18/94	2 49	ORDER for Bench Warrant and setting Bond at $100,000 w/10% for Brigido NMI Marmolejo; Bond set to $50,000 w/10% for Mario NMI Salinas; Bond set to $50,000 w/10% for Eloy NMI Zavala; Bond set to $50,000 w/10% for Edelmiro NMI Flores. (Signed by Mag Judge Nancy K. Pecht), entered. (mis) [Entry date 02/01/94] [Edit date 02/01/94]
1/18/94	–	Bench WARRANT issued as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores (mis) [Entry date 02/01/94]
1/18/94	3 50	First Appearance as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Mag Judge William M. Mallet (Ct Reporter: ERO) Deft's appeared w/counsel. Deft remanded to custody. (Defendant informed of rights.), filed. (mis) [Entry date 02/01/94]

1/18/94	5 51	NOTICE of Appearance for Mario NMI Salinas by Attorney Francisco Enriquez, filed. (mis) [Entry date 02/01/94]
1/18/94	8 56	APPERANCE [sic] BOND entered by Mario NMI Salinas in Amount $50,000 with $1,000 deposit, filed. Bond Depositor: Frank Enriquez; 4401 North 22nd St.; McAllen, Texas 78504 (mis) [Entry date 02/01/94]
1/18/94	–	ORDER Setting Conditions of Release as to Mario NMI Salinas (Signed by Mag Judge William M. Mallet), entered. (mis) [Entry date 02/01/94]
1/25/94	18 57	Arraignment held before Mag Judge William M. Mallet (Ct Reporter: ERO) App: Greg Surovic f/govt, Robert Flores f/deft 1, Francisco Enriquez f/deft 2, Oscar Alvarez f/deft 3 and Oscar Alvarez f/deft 4. Defts cont'd on bond. Brigido NMI Marmolejo (1) count(s) 1, 2, 3, 4, 5-7, 8, Mario NMI Salinas (2) count(s) 1, 2, 3, 4, Eloy NMI Zavala (3) count(s) 2, 3, Edelmiro NMI Flores (4) count(s) 2, 3, 4, filed. (mis) [Entry date 02/03/94] [Edit date 02/09/94]
1/25/94	–	PLEA entered. Court accepts plea. Not Guilty:, Brigido NMI Marmolejo (1) count(s) 1, 2, 3, 4,

		5-7, 8, Mario NMI Salinas (2) count(s) 1, 2, 3, 4, Eloy NMI Zavala (3) count(s) 2, 3, Edelmiro NMI Flores (4) count(s) 2, 3, 4 (mis) [Entry date 02/03/94]
1/25/94	20 58	NOTICE TO DEFT as to Mario NMI Salinas setting Motion Filing deadline on 2/7/94; Pretrial Conference for 9:00 2/28/94; Jury Selection for 9:00 3/1/94; before Judge Ricardo H. Hinojosa (Signed by Mag Judge William M. Mallet), entered. Parties ntfd. (mis) [Entry date 02/03/94] [Edit date 02/09/94]
2/3/94	23	MOTION by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores SEALED MOTION, filed. (mis) [Entry date 02/08/94] [Edit date 02/09/94]
2/4/94	25 59	Bench WARRANT Returned Executed as to Mario NMI Salinas on 1/18/94, filed. (mis) [Entry date 02/10/94]
2/7/94	52 61	MOTION by Mario NMI Salinas for grand jury transcripts, filed. (mis) [Entry date 02/10/94]
2/7/94	53 63	MOTION by Mario NMI Salinas to discover criminal records of witnesses, filed. (mis) [Entry date 02/10/94]

2/7/94	54 65	MOTION by Mario NMI Salinas for Govt to reveal agreements/concession/leniency/immunity to Witnesses, filed. (mis) [Entry date 02/10/94]
2/7/94	55 69	MOTION by Mario NMI Salinas for identification of informant, filed. (mis) [Entry date 02/10/94]
2/7/94	56 75	MOTION by Mario NMI Salinas for discovery and inspection, filed. (mis) [Entry date 02/10/94]
2/7/94	57 77	MOTION by Mario NMI Salinas for discovery witness list, filed. (mis) [Entry date 02/10/94]
2/7/94	58 79	MOTION by Mario NMI Salinas for Jencks Act Material, filed. (mis) [Entry date 02/10/94]
2/7/94	59 81	MOTION by Mario NMI Salinas for discovery and suppression of co-conspirator statmeents [sic], filed. (mis) [Entry date 02/10/94]
2/7/94	60 83	MOTION by Mario NMI Salinas to extend time to file additional pretrial motions, filed. (mis) [Entry date 02/10/94]
2/7/94	61 86	MOTION by Mario NMI Salinas to unseal Seach [sic] Warrant Affidavit and to suppress evidence, filed. (mis) [Entry date 02/10/94]

2/7/94	62 90	MOTION by Mario NMI Salinas for production and inspection of evidence and information which may lead to evidence, filed. (mis) [Entry date 02/10/94]
2/7/94	63 94	MOTION by Mario NMI Salinas for disclosure of impeaching information, filed. (mis) [Entry date 02/10/94]
2/7/94	64 100	MOTION by Mario NMI Salinas for Bill of Particulars, filed. (mis) [Entry date 02/10/94]
2/7/94	65 105	MOTION with Memorandum in Support by Mario NMI Salinas to require govt to serve notice of existence of electronic or mechanical surveillance, filed. (mis) [Entry date 02/10/94]
2/7/94	66 108	MOTION by Mario NMI Salinas for severance of trial, filed. (mis) [Entry date 02/10/94]
2/7/94	67 116	MOTION by Mario NMI Salinas to dismiss RICO counts in indictment, filed. (mis) [Entry date 02/10/94]
2/7/94	68 118	MOTION by Mario NMI Salinas to Join in Motions of co-deft's, filed. (mis) [Entry date 02/10/94]
2/7/94	69 124	MOTION by Mario NMI Salinas to dismiss based on double jeopardy, filed. (mis) [Entry date 02/10/94]

2/7/94	70 130	MOTION by Mario NMI Salinas to dismiss 18 USC 666 Counts in the indictment, filed. (mis) [Entry date 02/10/94]
2/7/94	71 173	MOTION by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores for sequestered and anonymous jury, filed. (mis) [Entry date 02/10/94]
2/7/94	72 175	MOTION by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores to unseal affidavits, filed. (mis) [Entry date 02/10/94]
2/7/94	73 180	MOTION by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores to Allow Counsel to Conduct Voir Dire Examination, filed. (mis) [Entry date 02/10/94]
2/7/94	74 183	MOTION by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores in limine, filed. (mis) [Entry date 02/10/94]
2/7/94	75 190	RESPONSE by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala,

		Edelmiro NMI Flores re: Defts' Motions for discovery and request for reciprocal discovery, filed. (mis) [Entry date 02/10/94]
2/7/94	76 191	Excludable Delay Worksheet X-E Ptrl Mtns start 2/7/94 as to Mario NMI Salinas, filed. (mis) [Entry date 02/10/94]
2/7/94	96	Motion hearing held as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores re: granting [51-1] motion to substitute attorney Roberto Yzaguirre for Jose chapa as to Eloy NMI Zavala (3) before Judge Ricardo H. Hinojosa (Ct Reporter: ERO) THE REST OF THESE PROCEEDINGS ARE SEALED BY THIS COURT, filed. (mis) [Entry date 02/14/94]
2/9/94	97 194	RESPONSE by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores re: [90-1] motion to determine existence of conspiracy, [88-1] motion to determine existence of conspiracy, [41-1] motion for hearing to determine existence of conspiracy, [37-1] motion for separate hearing to determine existence of conspiracy, filed. (mis) [Entry date 02/16/94]

2/10/94	118	TRANSCRIPT filed in case as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores for In Chambers Conference Hearing for dates of 2/10/94, filed. (pg) [Entry date 02/28/94] SEALED
2/11/94	100 205	RESPONSE by USA as to Mario NMI Salinas, Edelmiro NMI Flores re: [92-1] motion to dismiss RICO counts in indictment, [67-1] motion to dismiss RICO counts in indictment, filed. (mis) [Entry date 02/16/94]
2/11/94	102 206	ORDER granting [60-1] motion to extend time to file additional pretrial motions as to Mario NMI Salinas (2) (Signed by Mag Judge William M. Mallet), entered. Parties ntfd. (mis) [Entry date 02/16/94]
2/11/94	104 207	ORDER unsealing search warrants as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores (Signed by Mag Judge William M. Mallet), entered. Parties ntfd. (mis) [Entry date 02/17/94]
2/11/94	117 213	RESPONSE by USA as to Mario NMI Salinas, Edelmiro NMI Flores re: [93-1] motion to dismiss 18 USC 666 Counts in the indictment, [70-1] motion to

		dismiss 18 USC 666 Counts in the indictment, filed. (mis) [Entry date 02/17/94]
2/11/94	–	Deadline updated set dispositive motion filing deadline for 2/22/94 for Mario NMI Salinas, for Eloy NMI Zavala, for Edelmiro NMI Flores (mis) [Entry date 02/23/94]
2/16/94	120 216	RESPONSE by USA as to Mario NMI Salinas re: [69-1] motion to dismiss based on double jeopardy, filed. (pg) [Entry date 02/28/94]
2/17/94	121 221	RESPONSE by USA as to Mario NMI Salinas re: [66-1] motion for severance of trial, filed. (pg) [Entry date 02/28/94]
2/18/94	122 224	RESPONSE by USA as to Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores re: [91-1] motion for grand jury transcript, [52-1] motion for grand jury transcripts, filed. (mis) [Entry date 03/01/94]
2/18/94	123 227	RESPONSE by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores re: [111-1] motion for Notice of Govt intent to use evidence, [80-1] motion for Notice of Govt intent to use evidence, [48-1] motion for Notice of Govt intent to use evidence, filed. (mis) [Entry date 03/01/94]

2/22/94	124 231	RESPONSE by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores re: [112-1] motion for Bill of Particulars, [64-1] motion for Bill of Particulars, [39-1] motion for Bill of Particulars, [30-1] motion for Bill of Particulars, filed. (mis) [Entry date 03/01/94]
2/22/94	125 235	RESPONSE by Mario NMI Salinas to [71-1] motion for sequestered and anonymous jury, filed. (mis) [Entry date 03/01/94]
2/22/94	126 239	SECOND MOTION by Mario NMI Salinas to suppress evidence, filed. (mis) [Entry date 03/01/94]
2/22/94	127 243	THIRD MOTION by Mario NMI Salinas to suppress evidence, filed. (mis) [Entry date 03/01/94]
2/22/94	128	SEALED In-chambers conference as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen, filed. (mis) [Entry date 03/01/94]
2/23/94	131 246	JOINT MOTION by Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala,

		Edelmiro NMI Flores, USA for a proposed scheduling order, filed. (sa) [Entry date 02/25/94]
2/23/94	132 248	ORDER granting [131-1] joint motion for a proposed scheduling order as to Brigido NMI Marmolejo (1), Mario NMI Salinas (2), Eloy NMI Zavala (3), Edelmiro NMI Flores (4) (Signed by Mag Judge William M. Mallet), entered. Parties ntfd. Motion to be filed by March 25, 1994, responses to motions to be filed by April 1, 1994, Final pretrial is set f/April 26, 1994, Jury Selection set f/May 9, 1994 and trial set f/May 10, 1994. (sa) [Entry date 02/25/94]
2/23/94	–	Deadline updated set scheduling order deadlines: Pretrial Conference for 4/26/94; Jury Selection for 5/9/94; Motion Response by 4/1/94; Motion Filing to 3/25/94; Jury Trial for 5/10/94 for Brigido NMI Marmolejo Jr, for Mario NMI Salinas, for Eloy NMI Zavala, for Edelmiro NMI Flores (sa) [Entry date 02/25/94]
2/23/94	133 249	ORDER OF RECUSAL as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores (Signed by Judge Ricardo H. Hinojosa), entered. Parties ntfd. (sa) [Entry date 02/25/94]

2/23/94	–	CASE reassigned to Judge George P. Kazen (sa) [Entry date 02/25/94]
3/4/94	134 292	RESPONSE by USA as to Mario NMI Salinas re: [127-1] motion to suppress evidence, [126-1] motion to suppress evidence, filed. (sa) [Entry date 03/16/94]
3/14/94	139 294	Rule 12.3 NOTICE by Mario NMI Salinas, filed. (pg) [Entry date 03/28/94]
3/15/94	140 297	Response by USA to Mario NMI Salinas Notice of intention to claim a defense of actual or believed exercise of public authority pursuant to Rule 12.3, filed. (pg) [Entry date 03/28/94]
3/15/94	141 299	Pending Motions Hearing as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen Ct Reporter: A DeLeon T. Canales, F Enriquez, J Chapa and O Alvarez f/defts. Court will enter ruling on grand jury transcript testimony. Govt will reveal deal w/informant. Exculpatory material will be given to defts by Govt. Govt will disclose 404(b) material by 4/1/94. Addl motions due 3/25/94 Responses due 4/1/94. Deft 4 Motion to suppress co-deft stmts – MOOT. Deft 1 404(b) motion – Govt will

		respond on issue of bribery. Ct takes motions under advisement. Oral motion to try case in McAllen – DENIED. Case may be set for trial May or June 1994. (pg) [Entry date 03/28/94]
3/15/94	–	ORAL ORDER as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores granting [107-1] motion for Pretrial Notice of 404(b) Evidence as to Brigido NMI Marmolejo (1), mooting [83-1] motion to suppress any oral or written statements of a co-deft as to Edelmiro NMI Flores (4), granting [54-1] motion for Govt to reveal agreements/ concession/leniency/immunity to Witnesses as to Mario NMI Salinas (2) (Entered by Judge George P. Kazen) (pg) [Entry date 03/28/94]
3/25/94	143 307	AMENDED MOTION by Mario NMI Salinas to dismiss based upon double jeopardy referring to: [69-1] motion to dismiss based on double jeopardy, filed. (mis) [Entry date 03/29/94]
3/25/94	144 318	SECOND MOTION by Mario NMI Salinas to dismiss 18 USC 666 Counts in the indictment based on lack of federal assistance, filed. (mis) [Entry date 03/29/94]

3/25/94	145 321	SUPPLEMENTAL MOTION by Mario NMI Salinas to dismiss 18 USC 666 Counts of the indictment referring to: [93-1] motion to dismiss 18 USC 666 Counts in the indictment, filed. (mis) [Entry date 03/29/94]
3/25/94	146 325	SUPPLEMENTAL MOTION by Mario NMI Salinas to suppress evidence referring to: [126-1] motion to suppress evidence, filed. (mis) [Entry date 03/29/94]
3/28/94	148 330	RESPONSE by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores re: Defts' Motions for notice of Rule 404(B) material, filed. (mis) [Entry date 03/29/94]
4/4/94	149 336	RESPONSE by USA as to Mario NMI Salinas re: [144-1] motion to dismiss 18 USC 666 Counts in the indictment based on lack of federal assistance, filed. (mis) [Entry date 04/07/94]
4/4/94	150 339	RESPONSE by USA as to Mario NMI Salinas re: [143-1] amended motion to dismiss based upon double jeopardy, filed. (mis) [Entry date 04/07/94]
5/3/94	154 342	Motion hearing held as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala,

		Edelmiro NMI Flores re: denying [146-1] supplemental motion to suppress evidence as to Mario NMI Salinas (2), denying [143-1] amended motion to dismiss based upon double jeopardy as to Mario NMI Salinas (2), denying [127-1] motion to suppress evidence as to Mario NMI Salinas (2), denying [126-1] motion to suppress evidence as to Mario NMI Salinas (2), withdrawing [71-1] motion for sequestered and anonymous jury as to Brigido NMI Marmolejo (1), Mario NMI Salinas (2), Eloy NMI Zavala (3), Edelmiro NMI Flores (4), denying [69-1] motion to dismiss based on double jeopardy as to Mario NMI Salinas (2) before Judge George P. Kazen (Ct Reporter: Alf DeLeon), filed. (mis) [Entry date 05/09/94]
5/3/94	155 359	COURT'S EXHIBIT LIST as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 05/09/94]
5/3/94	156 362	NOTICE OF INTENT to Use Evidence by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 05/09/94]

5/3/94	157 399	(Requested) Proposed Jury Instructions by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 05/09/94]
6/4/94	158 400	ORDER for govt to produce transcripts of each witness as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores (Signed by Judge George P. Kazen), entered. Parties n'fd. (mis) [Entry date 06/10/94] [Edit date 06/14/94]
6/27/94	159 424	PROPOSED SPECIAL VERDICT FORMS by USA as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores, filed. (mis) [Entry date 06/30/94]
6/30/94	160 431	ORDER denying [145-1] supplemental motion to dismiss 18 USC 666 Counts of the indictment as to Mario NMI Salinas (2), denying [144-1] motion to dismiss 18 USC 666 Counts in the indictment based on lack of federal assistancce [sic] as to Mario NMI Salinas (2), denying [142-1] motion to dismiss Section 666 counts in the indictment based on lack of Federal assistance (second motion) as to Edelmiro NMI Flores (4), denying [137-1] motion to dismiss RICO counts

		in the indictment as to Eloy NMI Zavala (3), denying [136-1] motion to dismiss 18 USC Section 666 Counts in the Indictment as to Eloy NMI Zavala (3) (Signed by Judge George P. Kazen), entered. Parties ntfd. (mis) [Entry date 07/06/94]
7/11/94	162 432	MEMORANDUM AND ORDER as to Brigido NMI Marmolejo Jr, Mario NMI Salinas denying [135-1] motion to suppress evidence (Signed by Judge George P. Kazen), entered. Parties ntfd. (sa) [Entry date 07/14/94]
7/15/94	163 433	Pre-trial conference as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen Ct Reporter: none, filed. G Surovic f/Govt T Canales, F Enriquez, J Chapa and O Alvarez f/defts. Conference held in chambers without Ct Rptr. Facts of case discussed and well as discussion on exhibits, indictment and voir dire. (pg) [Entry date 07/21/94]
7/15/94	164 445	Second Amended MOTION by Mario NMI Salinas to dismiss based on double jeopardy, filed. (pg) [Entry date 07/21/94]
7/15/94	–	Voir dire begun as to Brigido NMI Marmolejo (1) count(s) 1, 2, 3, 4, 5-7, 8, Mario NMI Salinas (2)

		count(s) 1, 2, 3, 4, Eloy NMI Zavala (3) count(s) 2, 3, Edelmiro NMI Flores (4) count(s) 2, 3, 4, filed. (pg) [Entry date 07/21/94]
7/15/94	165 446	Jury selection as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen Ct Reporter: A DeLeon, filed. G Surovic f/Govt T. Canales, F Enriquez, J Chapa and O Alvarez f/defts. Fourteen jurors selected and sworn – to return 7/18/94. (pg) [Entry date 07/21/94]
7/18/94	166 449	1st Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen (Ct Reporter: Alf DeLeon; Interpreter: BV Zapata), filed. (mis) [Entry date 08/05/94]
7/18/94	183 530	MOTION by Mario NMI Salinas in limine, filed. (mis) [Entry date 08/12/94]
7/19/94	167 452	2nd Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen (Ct Reporter: Alf DeLeon; Interpreter: BV Zapata), filed. (mis) [Entry date 08/05/94]

7/20/94	168 454	3rd Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen (Ct Reporter: Alf DeLeon; Interpreter: BV Zapata), filed. (mis) [Entry date 08/05/94]
7/21/94	169 457	4th Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen (Ct Reporter: Alf DeLeon; Interpreter: BV Zapata), filed. (mis) [Entry date 08/05/94]
7/22/94	170 460	5th Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen (Ct Reporter: Alf DeLeon), filed. (mis) [Entry date 08/05/94]
7/25/94	171 463	6th Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores held before Judge George P. Kazen (Ct Reporter: Alf DeLeon) Defts 3 & 4 discharged. Deft's Mtn for Jgmt of Acquittal on all cts denied, filed. (mis) [Entry date 08/05/94]

7/26/94	172 466	7th Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas held before Judge George P. Kazen (Ct Reporter: Alf DeLeon), filed. (mis) [Entry date 08/05/94]
7/26/94	184 568	EDITED INDICTMENT for jury as per Cts Instructions as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, filed. (mis) [Entry date 08/12/94]
7/27/94	173 467	8th Day of Jury trial as to Brigido NMI Marmolejo Jr, Mario NMI Salinas held before Judge George P. Kazen (Ct Reporter: Alf DeLeon) Jury Verdict, filed. (mis) [Entry date 08/05/94]
7/27/94	174 513	Jury note #1 filed as to Mario NMI Salinas (mis) [Entry date 08/05/94]
7/27/94	176 517	JURY VERDICT Guilty: Mario NMI Salinas (2) count(s) 2, 3, 4, Not Guilty: Mario NMI Salinas (2) count(s) 1 Mario NMI Salinas (2) count(s) 1. Acquitted by jury after trial, filed. (mis) [Entry date 08/05/94]
7/27/94	179 518	ORDER for Disclosure of PSI as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, PSI completion by 9/1/94, Objection to PSI due 9/11/94, Final PSI due 9/23/94, entered. Parties ntfd. (mis) [Entry date 08/05/94] [Edit date 09/22/94]

8/1/94	182 526	MOTION by Mario NMI Salinas for Judgment of Acquittal, filed. (mis) [Entry date 08/05/94]
8/8/94	185 580	ORDER denying [182-1] motion for Judgment of Acquittal as to Mario NMI Salinas (2) (Signed by Judge George P. Kazen), entered. Parties ntfd. (mis) [Entry date 08/12/94]
8/11/94	186 586	RESPONSE by USA as to Mario NMI Salinas re: [182-1] motion for Judgment of Acquittal, filed. (mis) [Entry date 08/17/94]
11/7/94	190 590	RESPONSE/OBJECTION by USA to Presentence Investigation Report as to Mario NMI Salinas, filed. (mis) [Entry date 11/09/94]
11/8/94	191 614	OBJECTION by Mario NMI Salinas to Presentence Investigation Report, filed. (mis) [Entry date 11/10/94]
11/9/94	194 615	FINAL PRESENTENCE INVESTIGATION REPORT (Sealed) as to Mario NMI Salinas, filed. (mis) [Entry date 11/16/94]
11/9/94	195 616	SEALED Confidential Sentencing Recommendation regarding Mario NMI Salinas to the Court, filed and placed in vault. (mis) [Entry date 11/16/94]
11/15/94	196 628	MOTION by Mario NMI Salinas for bond pending appeal, filed. (mis) [Entry date 11/16/94]

11/21/94	197 633	RESPONSE by USA as to Mario NMI Salinas to [191-1] objection, filed. (mis) [Entry date 11/23/94]
11/23/94	200 634	Sentencing held before Judge George P. Kazen (Ct Reporter: ERO) App: Greg Surovic f/govt and Francisco Enriquez f/deft. Deft to remain out on bond pending appeal. Mario NMI Salinas (2) count(s) 2, 3, 4. Cts. 2-4: 36 months to serve; 3 yrs TSR and $5,000 fine., filed. Mario NMI Salinas terminated. (mis) [Entry date 11/29/94]
11/23/94	201 636	NOTICE OF APPEAL of Conviction & Sentence by Mario NMI Salinas (2) count(s) 2, 3, 4, filed. (mis) [Entry date 11/29/94]
11/23/94	202 637	ORDER granting [196-1] motion for bond pending appeal as to Mario NMI Salinas (2) (Signed by Judge George P. Kazen), entered. Parties ntfd. (mis) [Entry date 11/29/94]
11/28/94	203 640	MOTION by USA as to Mario NMI Salinas for order of forfeiture, filed. (mis) [Entry date 11/29/94]
11/29/94	205 647	JUDGMENT as to Mario NMI Salinas (2) count(s) 2, 3, 4 (Signed by Judge George P. Kazen), entered. Parties ntfd. (mis) [Entry date 11/30/94]

3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Pretrial Conference for dates of 3/15/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]
3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Pretrial Conference Hearing for dates of 5/3/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]
3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Jury Selection for dates of 7/15/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]
3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Trial – Vol I Hearing for dates of 7/18/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]

3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Trial – Vol II Hearing for dates of 7/18/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]
3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Trial – Vol III Hearing for dates of 7/18/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]
3/20/95	–	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Trial – Vol IV Hearing for dates of 7/18/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95] [Edit date 03/22/95]
3/20/95	227	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Trial – Vol V Hearing for dates of 7/18/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95]

3/20/95	228	TRANSCRIPT as to Brigido NMI Marmolejo Jr, Mario NMI Salinas, Eloy NMI Zavala, Edelmiro NMI Flores Re: [201-1] appeal, [199-1] appeal Trial – Vol VI Hearing for dates of 7/18/94 before Judge Kazen, filed. (pg) [Entry date 03/22/95]

GOVERNMENT EXHIBIT 43
M-94-010

UNITED STATES DEPARTMENT OF JUSTICE
UNITED STATES MARSHALS SERVICE

INTERGOVERNMENTAL COOPERATIVE AGREEMENT NUMBER 4-79-84

This Agreement is entered into between the United States Marshals Service and Hidalgo County, Texas in accordance with the terms and conditions of Articles I through XI and Schedules A, B and C attached hereto.

The below individuals are authorized by law to accept and commit to this Agreement for and on the behalf of the:

UNITED STATES MARSHALS SERVICE

SIGNATURE:
Howard Safir

TYPED NAME:
Howard Safir

TITLE:
Assistant Director for Operations

ADDRESS:
One Tysons Corner Center
McLean, Virginia 22102

DATE:
5/3/84

SIGNATURE:
B.S. Baker

COUNTY:
Hidalgo, Texas

SIGNATURE:
Santos Saldana

TYPED NAME:
Honorable Santos Saldana

TITLE:
County Judge

ADDRESS:
P.O. Box 1356
Edinburg, Texas 78539

DATE:
May 29, 1984

TYPED NAME:
B.S. Baker

TITLE:
United States Marshal

ADDRESS:

DATE:
8/14/84

ARTICLE I

PURPOSE:

The purpose of this Cooperative Agreement is to establish a legal relationship between the United States Marshals Service (USMS) and the County of Hidalgo (COUNTY). This Agreement is predicated upon the Federal government's requirement for detention space and services and the local government's provision of such services. All articles and schedules of this Agreement are binding upon the execution of this Agreement by both parties.

ARTICLE II

ASSURANCES:

The Cooperative Agreement provides for Federal participation in the funding of local governmental jail construction, renovation or improvement programs. A local government receiving Federal funds is required to assure and certify that it will, as a condition of receiving the funds, comply with applicable Federal laws and regulations governing Grants and Cooperative Agreements. By acceptance of this Agreement the COUNTY so assures

and certifies it will comply with the provisions, guidelines, regulations, and laws listed in Schedule A of this Agreement.

ARTICLE III

COOPERATIVE AGREEMENT PLAN (CAP):

A. Negotiations between the COUNTY and the USMS have resulted in a formulation of a Cooperative Agreement Plan which is incorporated as Schedule B of this Agreement.

B. Requests for modifications, deletions or additions to Schedule B may be made by the recipient's submission of a formal written request to the Assistant Director for Operations, United States Marshals Service or his designee who must approve all changes in writing.

C. The recipient has verified and ensures that all project(s) specified on Schedule B meet the applicable state and local laws, standards, policies, procedures or court orders governing or established for a detention facility.

D. It is the responsibility of the recipient to plan, initiate, and oversee the completion of the project(s); to prepare quarterly progress reports and periodic requests for payments; to certify the accuracy of contractor and vendor billings; to ensure the cost efficient and timely completion of projects; and to immediately notify the U.S. Marshal in writing of any issues or problems real or

anticipated which might affect the successful completion of the project(s) within the time frame and cost ceilings established in Schedule B.

E. It is the responsibility of the U.S. Marshal or his designee to make monthly on-site inspections of the project(s) underway; to review and certify interim and final payment requests submitted by the recipient; to ensure that CAP funding ceilings are not exceeded; and to provide United States Marshals Service Headquarters with written recommendations on any proposed changes or modifications to this Agreement.

ARTICLE IV

FUNDING LEVEL:

A. The USMS will provide Federal funding in an amount not to exceed $850,000.00 for the project(s) listed on Schedule B from the support of U.S. Prisoners Appropriation for Fiscal Year 1984.

B. The COUNTY accepts responsibility for all costs associated with the project(s) which exceed the level of Federal funding provided.

C. Funds specified and approved for one project shall not be transferred to another project or be used for any other purpose unless authorized by a written modification to this Agreement issued by the Assistant Director for Operations or his designee.

ARTICLE V

SERVICE AND SPACE GUARANTEE:

A. The COUNTY agrees to accept and provide detention space and services for Twenty (20) Federal prisoners each day on a space available basis upon the request of the U.S. Marshal from the date of acceptance of this Agreement until the completion of the projects listed on Schedule B.

B. The COUNTY agrees to accept and provide detention space and services for *One Hundred (100) Federal prisoners each day upon the request* of the U.S. Marshal at the Hidalgo County Jail for a period of *Fifteen (15) years* commencing on the date of completion of all projects listed on Schedule B and the fulfillment of payments by the USMS.

C. the Intergovernmental Agreement (IGA) for the housing of Federal prisoners will remain in effect through the period specified in Article VB, and will continue thereafter until terminated in writing at the will of either party. *Per diem payments provided for in the IGA will continue to be negotiated in accordance with Federal Cost and Pricing Standards.*

ARTICLE VI

FINANCIAL PROVISIONS:

A. The USMS will obligate and reserve the total amount of funds established under this Agreement. Requests for reimbursement for work completed will be drawn up by the recipient on a Standard Form 270

(Request for Advance or Reimbursement) and submitted along with a CAP Reimbursement Detail Sheet to the U.S. Marshal for review and certification. Payment to the recipient will be made by the U.S. Marshal upon review and written authorization by the Chief, Operations Support Division. Payments may only be issued to the recipient rather than vendors or contractors.

B. The recipient certifies that all requests for payment submitted shall be supported by valid invoices which are in accordance with the projects authorized in Schedule B of this Agreement and subject to on-site inspection by the U.S. Marshal and his designee. Copies of paid invoices shall be clearly marked with the appropriate CAP project number they are charged to and maintained in CAP project files by the recipient. All such documentation shall be made available for review upon the request of the U.S. Marshal, USMS Headquarters, or a Federal audit agency.

C. The recipient certifies that no request for payment will be submitted for work, materials or services which have been previously funded from Federal funds from any other source.

D. The recipient will maintain such books, records, documents, evidence, and accepted accounting procedures and practices which will accurately reflect all costs relating to this Agreement for a period of at least three years following completion of all the projects and final payment. All such documents

will be subject to periodic on-site review as deemed necessary by the U.S. Marshal, USMS Headquarters staff, and Federal audit agencies.

ARTICLE VII

DISPUTES:

All questions of interpretation of any or all parts of this Agreement shall be first addressed and resolved by negotiation between the representative(s) of the COUNTY and the Chief, Operations Support Division. Any disputes not resolved will be referred to the Assistant Director for Operations and Chief Executive Officer of the COUNTY.

The Director, United States Marshals Service, will be the final deciding official in all disputes concerning this Agreement, unless otherwise disposed of in a court of law.

ARTICLE VIII

STOP WORK:

A. The Assistant Director for Operations or his designee may issue and the COUNTY will accept a written order to hold or Stop Work on one or more projects funded under this Agreement for a period of 30 days. Such orders will be issued pursuant to sufficient cause, such as reason to believe work is being performed outside of the terms of Schedule B or for financial improprieties found during a monitoring inspection or voucher and records review.

B. A Stop Work Order may be continued, cancelled or reissued as an order of termination.

C. The COUNTY is responsible for any costs incurred after the issuance of a Stop Work Order unless such work, material, equipment or services were purchased prior to the issuance of the Stop Work Order and delivery cannot be cancelled.

ARTICLE IX

TERMINATION:

A. This Agreement may be terminated in-full or in-part by the COUNTY at any time prior to the completion of the project listed in Schedule B provided that all Federal funds received for the project by the COUNTY are refunded in full to the USMS. All termination notices shall be made in writing by the COUNTY to the Assistant Director for Operations.

B. This Agreement may be terminated by the USMS at any time prior to the completion of project(s) listed in Schedule B. Such terminations may be the result of the failure of the recipient to start or complete a project in accordance with Schedule B or for a violation of the Agreement. All termination notices shall be made in writing by the Assistant Director for Operations to the recipient.

C. This Agreement shall not be terminated during the period specified in Article VB by

either party after the completion of all projects and the issuance of final payment by the USMS unless by mutual agreement.

ARTICLE X

BREACH OF AGREEMENT:

A. In the event detention space and services are not provided to the level guaranteed, unless as a result of fire, riot or other act of God or other emergency acceptable to the USMS, the COUNTY will reimburse the USMS for all funding provided by this Agreement, and for all costs associated with the relocation of Federal prisoners to another facility including any jail costs over and above the rate paid to the COUNTY.

B. The provision of Article XA will be exercised by the USMS only after violation(s) of the provisions for guaranteed space has been established, and negotiations between the USMS and recipient have not resulted in a mutually acceptable resolution and a written notice of Breach of Agreement has been issued by the Assistant Director for Operations.

ARTICLE XI

REPORTS:

A. *A progress report shall be submitted within ten days of the close of each quarter by the recipient to the U.S. Marshal. A progress report format is provided by Schedule C.*

B. A final CAP report shall be submitted by the recipient at the completion of all projects which reflects the date of completion, final costs, and includes a statement that the Cooperative Agreement is completed.

C. *Failure to submit quarterly progress reports may be interpreted as non-compliance with this Agreement.*

United States Department of Justice

United States Marshals Service

Intergovernmental Service Agreement

Housing of Federal Prisoners

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1. AGREEMENT NUMBER

J-D79-M-001

2. EFFECTIVE DATE

9/1/84

3. REQUISITION/PURCHASER/REQUEST NO.

0181-D79-84

4. CONTROL NO.

5. ISSUING OFFICE

UNITED STATES MARSHALS SERVICE
Operations Support Division
Program Administration Branch
1-TYSONS CORNER CENTER
MCLEAN, VIRGINIA 22102

6. GOVERNMENT ENTITY

NAME AND ADDRESS *(Street, city, county, State and ZIP code*	Hidalgo County Detention Center, P.O. Box 359 Edingburg, Texas 78539

FACILITY CODE(S)

6GV

Contact Person Juan Jose Munoz, Chief

Area Code & Telephone No. (512) 383-8114 ext. 73

7. APPROPRIATION DATA

1541020

8. ITEM NO.

(1)

(2)

9. SUPPLIES/SERVICES

This Agreement is for the housing, safekeeping and subsistence of adult male and female federal prisoners in accordance with the contents set forth herein.

This Agreement consists of the following:

(A) I-G-A Cover Page, Form #241

(B) Agreement Schedule, pages 2-5.

10. QUANTITY

ESTIMATED USMS PRISONER DAYS/YR.

36,500

11. UNIT

PDs

12. UNIT PRICE

FIXED RATE

$25.09

13. AMOUNT

ESTIMATED ANNUAL PAYMENT

$915,785

14.

AGENCY CERTIFYING

To the best of my knowledge and belief, data submitted in support of this agreement is true and correct, the document has been duly authorized by the governing body of the Department or Agency and the Department or Agency will comply with ALL PROVISIONS SET FORTH HEREIN.

15. NAME AND TITLE OF PERSON(S) AUTHORIZED TO SIGN OFFER

/s/ Brig Marmolejo — Date 9-13-84
(Signature)

Brig Marmolejo — Sheriff
Name *(Type or Print)* — Title

_____ — Date _____
(Signature)

_____ — _____
Name *(Type or Print)* — Title

16. TYPE OF USE

- ❑ Hold Over
- ■ Regular Support
- ❑ Seasonal Support
- ❑ Other

17. PRISONER TYPE TO BE INCLUDED

UNSENTENCED	SENTENCED
■ Adult Male	■ Adult Male
■ Adult Female	■ Adult Female
❑ Juvenile Male	❑ Juvenile Male
❑ Juvenile Female	❑ Juvenile Female
■ Aliens	❑ Work Release
	❑ YCA Male
	❑ YCA Female

18. LEVEL OF USE

- ❑ Minimum
- ❑ Medium
- ■ Major

19. *This Negotiated Agreement is Hereby Approved and Accepted for*

THE UNITED STATES OF AMERICA BY DIRECTION OF THE DIRECTOR OF THE UNITED STATES MARSHALS SERVICE

BY /s/ J B Enders
(SIGNATURE OF CONTRACTING OFFICER)

20. ANTICIPATED ANNUAL USAGE

	UNSEN-TENCED	SEN-TENCED	ALIENS	TOTAL
No. of Prisoners	100	—	—	100
Prisoner Days	36,500	—	—	36,500
Guard Hours	—	—	—	—

21. NAME OF AUTHORIZING OFFICIAL
(Type or Print)

Joseph B. Enders

DATE SIGNED

August 30, 1984

PRIOR EDITIONS ARE OBSOLETE AND ARE NOT TO BE USED

UNITED STATES MARSHALS SERVICE
AGREEMENT SCHEDULE
(SUPPORT OF U.S. PRISONERS)

AGREEMENT NO.

J-D79-M-001

ARTICLE I – PURPOSE

The purpose of this Intergovernmental Service Agreement (IGA) is to establish a formal binding relationship between the U.S. Marshals Service and other federal user agencies (the government) and Hidalgo County, Texas

(The County) for the detention of persons charged with or convicted of violations of federal law or held as material witnesses (federal prisoners) at the Hidalgo County Jail (the facility).

ARTICLE II – SUPPORT AND MEDICAL SERVICES

1. The County agrees to accept and provide for the secure custody, care and safekeeping of federal prisoners in accordance with state and local laws, standards, policies, procedures, or court orders applicable to the operations of the facility.

2. The County agrees to provide federal prisoners with the same level of medical care and services provided local prisoners including the transportation and security for prisoners requiring removal from the facility for emergency medical services. All costs associated with hospital or health care services provided outside the facility will be paid directly by the government.

3. The County agrees to notify the U.S. Marshal as soon as possible of all emergency medical cases requiring removal of a prisoner from the facility and to obtain prior authorization for removal for all other medical services required.

ARTICLE III – RECEIVING AND DISCHARGE

1. The County agrees to accept as federal prisoners those persons committed by federal law enforcement officers for violations of federal laws only upon presentation by the officer of proper law enforcement credentials.

2. The County agrees to release federal prisoners only to law enforcement officers of agencies initially committing the prisoner (i.e. DEA, INS, etc.) or to a Deputy United States Marshal. Those prisoners who are remanded to custody by a U.S. Marshal may only be released to a U.S. Marshal or an agent specified by the U.S. Marshal of the Judicial District.

3. Federal prisoners may not be released from the facility or placed in the custody of state of local officials for any reason except for medical or emergency situations. Federal prisoners sought for a state or local court proceeding must be acquired through a Writ of Habeas Corpus or the Interstate Agreement of Detainers and then only with the concurrence of the District U.S. Marshal.

ARTICLE IV – PERIOD OF PERFORMANCE

This Agreement shall remain in effect for a period of Fifteen (15) years after completion of the Cooperative Agreement 4-79-84 and indefinitely thereafter until terminated in writing by either party. After the 15 year period provided for in CAP Agreement 4-79-84 is completed, if conditions of an unusual nature occur making it impractical or undesirable to continue to house prisoners, the County may suspend or restrict the use of the facility by any or all federal agencies by giving written notice to the U.S. Marshal and the affected user agency. Such notice will be provided 30 days in advance of the effective date of formal termination and at least two weeks in advance of a suspension or restriction of use unless an emergency situation requires the immediate relocation of prisoners.

ARTICLE V – ECONOMIC PRICE ADJUSTMENT

1. Payment rates shall be established on the basis of actual costs associated with the operation of the facility during a recent annual accounting period or upon an approved annual operating budget.

2. The rate may be renegotiated not more than once per year, after the Agreement has been effective for twelve months.

3. The County may initiate a request for a rate increase or decrease by notifying the U.S. Marshal in writing at least 60 days prior to the desired effective date of the adjustment. Each rate adjustment submitted must include a completed Basic Data Sheet and Certification Form available from the U.S. Marshal. The County agrees to provide additional cost information to support a rate increase and to permit an audit of accounting records upon request of the Marshals Service.

4. Criteria used to evaluate the increase or decrease in the per-capita rate shall be those specified in the federal cost standards for contracts and grants with State and local governments issued by the Office of Management and Budget.

5. The effective date of the rate modification will be negotiated and specified on the IGA Modification form approved and signed by a Marshals Service Contracting Officer. The effective date will be established on the first day of a month for accounting purposes. Payments at the modified rate will be paid upon the return of the signed modification by the authorized local official to the U.S. Marshal.

6. Unless other justifiable reasons can be documented by the County, per diem rate increases shall not exceed the National Inflation rate as established by the U.S. Department of Commerce.

ARTICLE VI – FINANCIAL PROVISIONS

1. The billing addresses of the agencies using this facility are as follows:

United States Marshal
515 Rusk Avenue
Houston, Texas 77002

Phone: (713) 229-2800

Immigration &
Naturalization Service
Asst. Regional
Commissioner, PMP
311 North Stemons
Freeway
Dallas, Texas 75207

Phone: (214) 729-6089

Bureau of Prisons
Community Programs Manager
2320 La Branch Street
Houston, Texas 77004

Phone: (713) 750-1755

2. The government shall reimburse the County at the fixed rates identified on page one of the agreement. The rates cover one person per prisoner day. The government may not be billed for two days when a prisoner is admitted one evening and removed the following morning. The County may bill for the day of arrival but not for the day of departure.

3. The Prompt Payment Act, Public Law 97-177 (96 Stat. 85, 31 USC 1801) is applicable to payments under this agreement and requires the payment to the County of interest on overdue payments. Determinations of interest due will be made in accordance with the provisions of the Prompt Payment Act and the Office of Management and Budget Circular A-25.

4. Payment under this agreement will be due on the thirtieth (30th) calendar day after receipt of a proper invoice, in the office designated to receive the invoice. The date of the check issued in payment shall be considered to be the date payment is made.

5. The original invoice shall be submitted to the government office that has been designated to receive invoices, as stated in paragraph 1. To constitute a proper invoice, the invoice must include the name, title, phone number and complete mailing address of the official of the designated payment office. In addition, it shall list each federal prisoner, the specific dates of confinement for each, the total days to be reimbursed, the agreed upon rate per day and the total amount billed (total days multiplied by the rate per day).

ARTICLE VII – GOVERNMENT FURNISHED PROPERTY

1. It is the intention of the Marshals Service to furnish excess federal property to local governments for the specific purpose of improving jail conditions and services. Accountable excess property, such as furniture and equipment, remains titled to the Marshals Service and shall be returned to the custody of the Marshals Service upon termination of the agreement.

2. The County agrees to inventory, maintain, repair, assume liability for and manage all federally provided accountable property and to immediately report the loss or destruction of accountable property to the U.S. Marshal. Annual inventory reports will be provided by the County to the U.S. Marshal.

3. The suspension of use or restriction of bed space made available to the Marshals Service are agreed to be grounds for the recall and return of any or all government furnished property.

4. The dollar value of property provided each year will not exceed the annual dollar payment made by the Marshals Service for prisoner support.

ARTICLE VIII – MODIFICATIONS/DISPUTES

1. Either party may initiate a request for modification to this agreement in writing. All modifications negotiated will be written and approved by the U.S. Marshals Service contracting officer and submitted to the County on form USM 241a for approval.

2. Disputes, questions or concerns pertaining to this agreement other than CAP space guarantees will be resolved between the U.S. Marshal and the appropriate County official. Unresolved issues are to be directed, in writing, to the Chief, Operations Support Division, U.S. Marshals Service Headquarters.

ARTICLE IX – INSPECTION AND TECHNICAL ASSISTANCE

1. The County agrees to allow periodic inspections of the facility by U.S. Marshals Service Inspectors. Findings of the inspection will be shared with the facility administrator in order to promote improvements to facility operations, conditions of confinement and levels of services.

2. The Marshals Service will endeavor to provide or acquire technical training and management assistance from other federal, state or local agencies or national organizations upon the request of the facility administrator.

ARTICLE X – SPECIAL PROVISIONS

Upon the execution of Cooperative Agreement Number 4-79-84 the County agrees to provide 20 detention spaces for Federal prisoners on a daily basis and upon the completion of the project, the County agrees to provide 100 spaces for federal user agencies each day for a period of 15 years.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA,	*	
PLAINTIFF,	*	**CRIMINAL NO. M-94-10**
v.	*	
BRIGIDO MARMOLEJO, JR., MARIO SALINAS, ELOY ZAVALA, and EDELMIRO FLORES,	*	
DEFENDANTS.	*	

INDICTMENT

(Filed Jan. 18, 1994)

THE GRAND JURY CHARGES:

Count One

1. At all times material to this indictment, the Hidalgo County Sheriff's Office, a law enforcement agency for the State of Texas, constituted an enterprise as defined in Title 18, United States Code, Section 1961(4).

2. At all times material to this indictment, the enterprise was responsible for enforcing the laws of the State of Texas within the County of Hidalgo, Texas, providing law enforcement and citizen protection for the citizens of Hidalgo County, Texas, and was also charged with maintaining and securing prisoners in the Hidalgo County Jail who were being held at the order of State and federal courts sitting in Hidalgo County, Texas.

3. At all times material to this indictment, the defendant BRIGIDO MARMOLEJO, JR., was the elected Sheriff of Hidalgo County, Texas, and the executive officer charged with managing and directing the affairs and operation of the Hidalgo County Sheriff's Office which also included the operation of the Hidalgo County Jail.

4. At all times material to this indictment, the defendant MARIO SALINAS was the Chief Jailer of the Hidalgo County Sheriff's Office, charged with maintaining and securing prisoners being held in the Hidalgo County Jail and with the day to day management of jail activities.

5. Texas Penal Code, Section 36.02(a) makes it a second degree felony under the laws of the State of Texas for any person to solicit, accept, or agree to accept any benefit as consideration for the recipient's decision, opinion, recommendation, vote, or other exercise of discretion as a public servant.

6. From in or about July of 1991 to in or about August of 1993, in the Southern District of Texas and elsewhere, the defendants

BRIGIDO MARMOLEJO, JR., and
MARIO SALINAS

being persons employed by and associated with the enterprise described in paragraph 1, above, which was engaged in and the activities of which affected interstate and foreign commerce, unlawfully, knowingly, and willfully did conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity as specified in paragraph 7, below.

7. The pattern of racketeering activity committed by the defendants consisted of the following acts involving bribery:

RACKETEERING ACT # 1

In or about September of 1991, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendants BRIGIDO MARMOLEJO, JR., and ELOY ZAVALA solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Adelberto Rodriguez, a benefit, to wit: a trailer and campaign sign with a value of approximately $5,000.00, as consideration for BRIGIDO MARMOLEJO, JR.'s and ELOY ZAVALA's decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 2

On or about October 16, 1991, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately

$6,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 3

On or about November 27, 1991, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $6,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 4

On or about December 28, 1991, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the

Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 5

On or about January 2, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant MARIO SALINAS solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: two RADO brand watches with a value of approximately $1,680.00 in United States Currency, as consideration for MARIO SALINAS's decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 6

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 6:

a. On or about January 2, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: two RADO brand watches with a value of approximately $4,600.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about January 4, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County. Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow

Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about January 9, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about January 11, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and

friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about January 21, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

f. On or about January 24, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 7

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 7:

a. On or about February 2, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about February 5, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detailed in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $6,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at

the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about February 8, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about February 16, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and

friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about February 24, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $6,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 8

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 8:

a. On or about March 3, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about March 12, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about March 14, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow

Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about March 18, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $6,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about March 21, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and

friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

f. On or about March 27, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 9

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 9:

a. On or about April 1, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for

BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about April 4, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about April 8, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo

Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about April 11, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 10

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 10:

a. On or about November 8, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County

Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about November 8, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: a white 1989 Pontiac Firebird Trans-Am GTA, VIN: 1G5FW2175KL243635, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about November 9, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $5,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about November 15, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about November 21, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow

Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

f. On or about November 24, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

g. On or about November 29, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and

friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 11

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 11:

a. On or about December 6, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about December 9, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about December 13, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at.the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about December 20, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow

Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about December 23, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $3,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

f. On or about December 26, 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and

friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 12

In or about December of 1992, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant MARIO SALINAS solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: a red 1984 Chevrolet Silverado pick-up truck, as consideration for MARIO SALINAS's decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his. family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 13

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 13:

a. On or about January 2, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County

Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about January 10, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about January 17, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about January 24, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about January 31, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo

Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 14

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 14:

a. On or about February 7, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about February 11, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County

Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $6,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about February 14, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about February 20, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about February 27, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 15

On or about February of 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant MARIO SALINAS solicited, accepted, and agreed to accept from Raul Valladares del Angel, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Salazar, a benefit, to wit: approximately $1,500.00 in United States

Currency, as consideration for MARIO SALINAS's, decision and exercise of discretion as a public servant to allow Raul Valladares del Angel to have contact visits at the Hidalgo County Jail with his family members and other visitors. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 16

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 16:

a. On or about March 7, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about March 10, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody

of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Jose Garcia, a benefit, to wit: a check in the amount of $3,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about March 14, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about March 18, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County

Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about March 20, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $11,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

f. On or about March 21, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

g. On or about March 28, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 17

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 17:

a. On or about April 3, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the

Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $1,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about April 4, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

c. On or about April 6, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and

Jose Garcia, a benefit, to wit: a check in the amount of $3,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

d. On or about April 11, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

e. On or about April 15, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the federal court and being detained in the Hidalgo County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $2,000.00 in United States Currency, as

consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Hidalgo County Jail with his family members and friends. This conduct is in violation of Texas Penal Code, Section 36.02(a).

RACKETEERING ACT # 18

The below named defendant committed the following acts of racketeering, any of which alone constitutes the commission of Racketeering Act No. 18:

a. On or about July 15, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Starr County Sheriff's Office by order of the federal court and being detained in the Starr County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $3,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to use his influence with the Sheriff of Starr County, Texas, to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Starr County Jail with his family members and for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to provide favorable conditions and special privileges to another federal prisoner, Michael Haymaker, should he be transferred to the Hidalgo County Jail. This conduct is in violation of Texas Penal Code, Section 36.02(a).

b. On or about July 19, 1993, in Hidalgo County, Texas, and within the jurisdiction of this Court, Defendant BRIGIDO MARMOLEJO, JR., solicited, accepted, and agreed to accept from Homero Heraldo Beltran-Aguirre, a person then being held in the custody of the Starr County Sheriff's Office by order of the federal court and being detained in the Starr County Jail, and Juan Antonio Guardado, a benefit, to wit: approximately $7,000.00 in United States Currency, as consideration for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to use his influence with the Sheriff of Starr County, Texas, to allow Homero Heraldo Beltran-Aguirre to have contact visits at the Starr County Jail with his family members and for BRIGIDO MARMOLEJO, JR.'s, decision and exercise of discretion as a public servant to provide favorable conditions and special privileges to another federal prisoner, Michael Haymaker, should he be transferred to the Hidalgo County Jail. This conduct is in violation of Texas Penal Code, Section 36.02(a).

All in violation of Title 18, United States Code, Section 1962(c).

COUNT TWO

1. The allegations contained in paragraphs one through five of Count One are realleged in this count and are incorporated by reference as if fully set forth herein.

2. At all times material to this indictment, the defendant ELOY ZAVALA was a chief deputy in the Hidalgo County Sheriff's Office and was charged with

managing and supervising the employees of the Hidalgo County Sheriff's Office.

3. At all times material to this indictment, the defendant EDELMIRO FLORES was a Jailer of the Hidalgo County Sheriff's Office, charged with maintaining and securing prisoners being held in the Hidalgo County Jail.

4. From in or about July of 1991 to in or about August of 1993, in the Southern District of Texas and elsewhere, the defendants

BRIGIDO MARMOLEJO, JR.,
MARIO SALINAS,
ELOY ZAVALA, and
EDELMIRO FLORES

being persons employed by and associated with the enterprise described in paragraph 1 of Count One, which was engaged in and the activities of which affected interstate and foreign commerce, unlawfully, knowingly, and willfully did combine, conspire, confederate, and agree with each other, and with persons known and unknown to the Grand Jury, to violate Title 18, United States Code, Section 1962(c), that is, to conduct and participate, directly and indirectly, in the conduct of the affairs of the enterprise through a pattern of racketeering activity.

5. It was further part of the conspiracy that each defendant agreed that two or more acts of racketeering activity, as specified in paragraph 7 of Count One, which are realleged and incorporated by reference herein, would be committed in the conduct of the affairs of the enterprise.

OVERT ACTS

In furtherance of the conspiracy and in order to effect the object thereof, the defendants and their co-conspirators committed and caused to be committed the following acts, among others:

1. In September of 1991, in Hidalgo County, Texas, Defendant ELOY ZAVALA accepted from Homero Heraldo Beltran-Aguirre and Adelberto Rodriguez, approximately ten pounds of dried meat (carne seca).

2. In September of 1991, in Hidalgo County, Texas, Defendant MARIO SALINAS accepted from Homero Heraldo Beltran-Aguirre and Adelberto Rodriguez, approximately ten pounds of dried meat (carne seca).

3. In September of 1991, in Hidalgo County, Texas, Defendant EDELMIRO FLORES accepted from Homero Heraldo Beltran-Aguirre and Adelberto Rodriguez, approximately ten pounds of dried meat and $400.00 in United States Currency.

4. On or about January 28, 1992, in Hidalgo County, Texas, Defendant MARIO SALINAS accepted from Homero Heraldo Beltran-Aguirre and Juan Antonio Guardado, approximately two kilograms of dried meat (carne seca).

5. On or about January 28, 1992, in Hidalgo County, Texas, Defendant BRIGIDO MARMOLEJO, JR., accepted from Homero Heraldo Beltran-Aguirre and Juan Antonio Guardado, approximately two kilograms of dried meat (carne seca).

6. On or about October 22, 1992, in Hidalgo County, Texas, Defendant BRIGIDO MARMOLEJO, JR., accepted

from Homero Heraldo Beltran-Aguirre and Juan Antonio Guardado, a cabrito and dried meat (carne seca).

7. On or about February of 1993, in Hidalgo County, Texas, Defendant EDELMIRO FLORES accepted from Raul Valladares del Angel and Juan Antonio Salazar approximately $500.00 in United States Currency.

8. On or about June 30, 1993, BRIGIDO MARMOLEJO, JR., traveled from Edinburg, Hidalgo County, Texas, to General Bravo, Nuevo Leon, Mexico, and met with Juan Antonio Guardado to discuss the payment of $10,000.00 in United States Currency.

All in violation of Title 18, United States Code, Section 1962(d).

RICO FORFEITURE ALLEGATION

1. The allegations contained in Counts One and Two of this indictment are hereby realleged and incorporated by reference for the purpose of alleging forfeiture pursuant to the provisions of Title 18, United States Code, Section 1963.

2. The defendant BRIGIDO MARMOLEJO, JR., has acquired and maintained interests through the aforesaid racketeering activity, in violation of Title 18, United States Code, Section 1962, which interests are subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(1). The interests include, but are not limited to the following:

> $211,000.00 in U.S. currency in that such sum in the aggregate represents the proceeds the said defendant obtained directly and indirectly from

the racketeering activity as set forth in Counts One and Two of this indictment.

3. The defendant BRIGIDO MARMOLEJO, JR., has property constituting, and derived from, proceeds obtained, directly and indirectly, from the aforesaid racketeering activity in violation of Title 18, United States Code, Section 1962, which property is subject to forfeiture to the United States of America, pursuant to Title 18, United States Code, Section 1963(a)(3). The property includes, but is not limited to the following:

> $211,000.00 in U.S. currency in that such sum in the aggregate represents the proceeds the said defendant obtained directly and indirectly from the racketeering activity as set forth in Counts One and Two of this indictment.

4. If any of the property described above as being subject to forfeiture, as a result of any act or omission of the defendant –

a. Cannot be located upon the exercise of due diligence;

b. Has been transferred or sold to, or deposited with, a third person;

c. Has been placed beyond the jurisdiction of the Court;

d. Has been substantially diminished in value; or

e. Has been commingled with other property which cannot be divided without difficulty;

it is the intention of the United States, pursuant to Title 18, United States Code, Section 1963(m), to seek forfeiture of any other property of said defendant up to the value of

any property described above including, but not limited to, the following:

> The El Cibolo Ranch, being a 125.7 acre tract of land situated in Share One (1) of Tract One Hundred Fifty Eight (158), San Salvador del Tule Grant, Hidalgo County, Texas, described by metes and bounds in the warranty deed to the Veterans Land Board dated December 21, 1971, recorded in Volume 1310, pages 16-18, Deed Records of said County, Texas; and also further described in that Contract of Sale to said Grantee dated February 2, 1972, recorded in Volume 1310, pages 19-23, Deed Records of Hidalgo County, Texas;
>
> 21.40 acres of land, more or less, situated in Hidalgo County, Texas, and being a part of Tract 154, San Salvador del Tule Grant Partition in Cause No. 422 in the District Court of Hidalgo County, Texas, said 21.40 acres of land being further described by metes and bounds in a Warranty Deed dated October 24, 1986, recorded in Volume 2370, pages 904-906, Deed Records of Hidalgo County, Texas;
>
> The property at 1316 East University Drive, Edinburg, Texas, being further described as all of Lots 4, 5, and 6, Block 3, Grove Park Addition, an addition to the City of Edinburg, Hidalgo County, Texas, according to the map recorded in Volume 7, page 49, Map records of Hidalgo County, Texas;
>
> The property at 1705 East University Drive, Edinburg, Texas, being further described as the east one-half of Lot 15 out of the Colonia Nueva Subdivision, City of Edinburg, Hidalgo County, Texas, as per map or plat thereof recorded in

Volume 20, page 67, Map Records of Hidalgo County, Texas;

The property at 2021 East University Drive, Edinburg, Texas, being further described as a 0.53 acre of land out of Lot 8, Section 269, Texas-Mexican Railway Company Survey of Lands in Hidalgo County, Texas, as per map or plat thereof recorded in Volume 24, pages 168-171, Deed Records of Hidalgo County, Texas, and also being a portion of Lot 9, Sunrise Estates Subdivision Phase I, as per map or plat thereof recorded in Volume 24, page 106, Map Records of Hidalgo County, Texas, more particularly described in the Warranty Deed dated August 3, 1989, recorded in Volume 2867, page 754, Deed records of Hidalgo County, Texas;

The property at 813 North 5th Street, Edinburg, Texas, being further described as Lot Seventeen (17), University North Subdivision Unit No. 1, an addition to the City of Edinburg, Hidalgo County, Texas, as per map or plat of record in Volume 18, page 41, Map Records of Hidalgo County, Texas;

The property at 306 South 34th Street, Edinburg, Texas, being further described as all of Lot Three (3), Block Two (2), Vela Subdivision, an addition to the City of Edinburg, Hidalgo County, Texas, according to the map or plat thereof recorded at Volume 1227, page 620, Map Records of Hidalgo County, Texas;

A 1.5 acre tract of land out of the Southeast corner of Lot 4, Block 1, A.J. McColl Subdivision, Hidalgo County, Texas, being more fully described by metes and bounds in the Warranty

Deed dated January 26, 1988, recorded in Volume 2553, pages 78-80, Deed Records of Hidalgo County, Texas;

All of Tracts Fifty-Six (56), Fifty-Seven (57) and Fifty-Eight (58) in the Los Ejidos de Reynosa Viejo Grant, Hidalgo County, Texas, as per map or plat thereof on record in Volume 7, pages 5-8, Map Records of Hidalgo County, Texas;

The property at 616 East 4th Street, Elsa, Texas, being further described as Lot Ten (10), ACCEDC-Elsa Project, an addition to the City of Elsa, Hidalgo County, Texas, according to the map or plat thereof on record in Volume 19, page 59, Map Records of Hidalgo County, Texas;

All of Lots One (1) and Two (2), Block Twelve (12) in the Town of Faysville, Hidalgo County, Texas, as per map or plat thereof recorded in Volume 3, page 20, Map Records of Hidalgo County, Texas;

All of Lots Twenty-Six (26) and Twenty-Seven (27), Block Eleven (11) in the Town of Faysville, Hidalgo County, Texas, as per map or plat thereof recorded in Volume 3, page 20, Map Records of Hidalgo County, Texas;

All of Lots Twenty-Four (24) and Twenty-Five (25), Block Eleven (11) in the Town of Faysville, Hidalgo County, Texas, as per map or plat thereof recorded in Volume 3, page 20, Map Records of Hidalgo County, Texas;

The account of BRIGIDO MARMOLEJO, JR., account number 1220220486 at the First National Bank of Edinburg, Texas;

The account of BRIGIDO MARMOLEJO, JR., account number 1136488 at the First National Bank of Edinburg, Texas;

All pursuant to Title 18, United States Code, Section 1963.

COUNT THREE

1. The allegations contained in paragraphs one through five of Count One and paragraphs two and three of Count Two are realleged in this count and are incorporated by reference as if fully set forth herein.

2. At all times material to this indictment the Hidalgo County Sheriff's Office was an agency of the local government of Hidalgo County, Texas, that received federal assistance in excess of $10,000 during the one year period beginning June 1, 1991, and ending June 1, 1992.

3. Between October 1, 1991 and April 14, 1992, in the Southern District of Texas and within the jurisdiction of this Court, Defendants

BRIGIDO MARMOLEJO, JR.,
MARIO SALINAS,
ELOY ZAVALA, and
EDELMIRO FLORES

did knowingly and corruptly solicit, demand, accept, and agree to accept something of value from Homero Heraldo Beltran-Aguirre intending to be influenced or rewarded in connection with a business, transaction, or series of transactions of the Hidalgo County Sheriff's Office involving something of value of $5,000 or more.

All in violation of Title 18, United States Code, Section 666(a)(1)(B) and Title 18 United States Code, Section 2.

COUNT FOUR

1. The allegations contained in paragraphs one through five of Count One and paragraphs two and three of Count Two are realleged in this count and are incorporated by reference as if fully set forth herein.

2. At all times material to this indictment the Hidalgo County Sheriff's Office was an agency of the local government of Hidalgo County, Texas, that received federal assistance in excess of $10,000 during the one year period beginning September 1, 1992, and ending September 1, 1993.

3. Between October 1, 1992 and July 20, 1993, in the Southern District of Texas and within the jurisdiction of this Court, Defendants

BRIGIDO MARMOLEJO, JR.,
MARIO SALINAS, and
EDELMIRO FLORES

did knowingly and corruptly solicit, demand, accept, and agree to accept something of value from Homero Heraldo Beltran-Aguirre intending to be influenced or rewarded in connection with a business, transaction, or series of transactions of the Hidalgo County Sheriff's Office involving something of value of $5,000 or more.

All in violation of Title 18, United States Code, Section 666(a)(1)(B) and Title 18 United States Code, Section 2.

COUNT FIVE

In or about between March of 1993 and April of 1993, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, the defendant

BRIGIDO MARMOLEJO, JR.

did aid, abet, and assist another to knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, to wit, the sale of real property constituting a portion of Lot 13, Block 47, Alamo Land & Sugar Company Division, Alamo, Hidalgo County, Texas, which involved the proceeds of a specified unlawful activity, that is the illegal manufacture, importation, sale, and distribution of a controlled substance, knowing that the transaction was designed in whole and in part to conceal and disguise the nature, location, source, ownership, and control of the proceeds of said specified unlawful activity and that while conducting and attempting to conduct such financial transaction knew that the property involved in the financial transaction, that is the real property described above, represented the proceeds of some form of unlawful activity.

All in violation of Title 18, United States Code, Sections 1956(a)(1)(B)(i) and 2.

COUNT SIX

On or about March 10, 1993, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, the defendant

BRIGIDO MARMOLEJO, JR.

did knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, to wit, depositing check number 2041 drawn on the account of G & R Produce at the McAllen National Bank, into **BRIGIDO MARMOLEJO, JR.'s** personal account, account number 114-8621, at the First National Bank of Edinburg, Texas, which involved the proceeds of a specified unlawful activity, that is bribery a second degree felony under the laws of the State of Texas, with the intent to promote the carrying on of a specified unlawful activity and that, while conducting and attempting to conduct such financial transaction, the defendant knew that the property involved in the financial transaction, that is check number 2041 drawn on the account of G & R Produce at the McAllen National Bank, represented the proceeds of some form of unlawful activity.

All in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

COUNT SEVEN

On or about April 6, 1993, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, the defendant

BRIGIDO MARMOLEJO, JR.

did knowingly conduct and attempt to conduct a financial transaction affecting interstate and foreign commerce, to wit, cashing of check number 2139 drawn on the account of G & R Produce at the McAllen National Bank, which involved the proceeds of a specified unlawful

activity, that is bribery, a second degree felony under the laws of the State of Texas, with the intent to promote the carrying on of a specified unlawful activity and that, while conducting and attempting to conduct such financial transaction, the defendant knew that the property involved in the financial transaction, that is check number 2139 drawn on the account of G & R Produce at the McAllen National Bank, represented the proceeds of some form of unlawful activity.

All in violation of Title 18, United States Code, Section 1956(a)(1)(A)(i).

COUNT EIGHT

1. The laws of the State of Texas, specifically Texas Penal Code, Section 36.02(a), provide that receiving a bribe is a felony violation of the laws of the State of Texas.

2. On or about June 30, 1993, in the Southern District of Texas and elsewhere, and within the jurisdiction of the Court, the defendant

BRIGIDO MARMOLEJO, JR.

did travel in interstate commerce from Edinburg, Hidalgo County, Texas, United States of America, to General Bravo, Nuevo Leon, Mexico, with the intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of an unlawful activity, said unlawful activity being bribery in violation of the laws of the State of Texas, Texas Penal Code, Section 36.02(a), and thereafter the defendant did perform and attempt to perform or attempt to perform

acts to promote, manage, establish, carry on and facilitate the promotion, management, establishment, and carrying on of said unlawful activity.

All in violation of Title 18, United States Code, Section 1952(a)(3).

A TRUE BILL

/s/ Illegible
GRAND JURY FOREMAN

GAYNELLE GRIFFIN JONES
UNITED STATES ATTORNEY

By: /s/ Gregory J. Surovic
Gregory J. Surovic
Assistant United States
Attorney

[p. 1580] • • •

ME IF I'M WRONG, IS THAT AT THAT POINT, YOUR THEORY IS THAT YOU REALLY DID NOTHING. YOU OFFERED NOTHING AND DID NOTHING AND HAD NO INTENTION OF DOING IT AND THAT THERE WAS NEVER EVEN ANY IDEA OF A QUID PRO QUO.

MR. CANALES: THAT'S FINE.

THE COURT: IT WAS SIMPLY A LOAN AFTER THE FACT. AND, CONVERSELY, THE GOVERNMENT'S THEORY IS THAT IT WAS IN RETURN FOR CALLING THE SHERIFF OF STARR COUNTY AND ALSO MAYBE DOING SOMETHING FOR HAMACKER, OR HAYMAKER, OR WHATEVER HIS NAME IS.

MR. CANALES: THAT'S FINE. THAT'S THE GOVERNMENT'S THEORY.

THE COURT: AND SO THAT'S THE BATTLE LINE ON THAT ONE.

MR. CANALES: THAT'S RIGHT.

THE COURT: AND THE OTHER ONES WOULD ALL BE NO MONEY PAID AT ALL. OR IN THE CASE OF AT LEAST THE WATCHES AND THE CAR AND SO FORTH, YES, BUT NO QUID PRO QUO.

MR. CANALES: THAT'S RIGHT. AND THAT, YOU KNOW, WE'RE NOT BEING CHARGED WITH RECEIVING GIFTS. I MEAN, THAT'S NOT –

THE COURT: WELL, BECAUSE IT WOULDN'T FIT THE . . . IT WOULD SUFFICE ANYWAY.

MR. CANALES: THAT'S RIGHT.

THE COURT: NOW, LET ME JUST SHARE WITH YOU ABOUT [p. 1581] COUNT TWO. I DON'T KNOW WHAT . . . I REALLY HAVEN'T HAD TIME . . . AND YOU'RE RIGHT, THE CASE HAS KIND OF MOVED FAST. I HAVEN'T HAD TIME TO TRY TO FIGURE OUT WHAT THE PROBLEM IS IN THE OLD FIFTH CIRCUIT CASES, BUT I DO WANT TO READ . . . I UNDERSTAND . . . AND MAYBE YOU ALL CAN READ IT TOO. BUT I UNDERSTAND THERE'S SOME ELEVENTH – RECENTLY ELEVENTH CIRCUIT CASE, AND I THINK IT'S IN YOUR LITERATURE, THAT TRIES TO SHOW HOW THE FIFTH CIRCUIT CASE WOULDN'T EVEN BE THAT LAW TODAY AND THAT THE LAW WOULD CLEARLY BE SOMETHING ELSE, BUT LET ME TELL YOU, BOTH SIDES, AND I GUESS TO MR. SUROVIC, HERE'S WHAT I THINK THE LAW OUGHT TO BE AND HERE'S PROBABLY THE ONLY WAY I'M WILLING TO SUBMIT IT, AND I'LL LET YOU DECIDE WHETHER YOU EVEN WANT IT OR NOT.

IT SEEMS TO ME COUNT TWO IS ABSOLUTELY REDUNDANT AS TO MARMOLEJO. I MEAN, BY THE TIME THE JURY HAS GONE DOWN SIXTEEN OR SEVENTEEN PREDICATE ACTS, THAT HE DID OR DID NOT COMMIT THEM, IT'S SORT OF SILLY TO START ALL OVER AGAIN AND SAY, WELL, DID HE DO IT IN CONSPIRACY WITH SALINAS. I MEAN, WHO CARES. THE ONLY VALUE OF COUNT TWO IS WHETHER YOU THINK THAT IT DOES SOMETHING FOR YOU EXTRA WITH SALINAS.

NOW, I'LL STOP RIGHT THERE AND I WOULD SAY THAT, OF COURSE, YOU'VE GOT TWO SHOTS AT HIM ON 666 AND YOU'VE ALSO GOT A COUPLE OF PREDICATE ACTS ON COUNT NO. 1, BUT IF YOU THINK YOU NEED PARAGRAPH TWO . . . I MEAN, COUNT TWO, THEN IT SEEMS TO ME THE FOLLOWING. I CAN'T CONCEIVE OF A [p. 1582] NOTION THAT A PERSON . . . THAT THE ONLY WAY YOU CAN CONSPIRE TO VIOLATE RICO IS TO REACH AN EXACT MEETING OF THE MINDS TO COMMIT TWO PRECISE, IDENTIFIABLE, DATABLE PREDICATE ACTS. 1 MEAN, IT JUST SEEMS TO ME THAT'S WEIRD.

SO, THEREFORE . . . WELL, IN THE FIRST PLACE, I'M NOT SURE THERE'D REALLY BE EVIDENCE TO SUPPORT THE THEORY THAT WAY BECAUSE I CAN'T PINPOINT EVIDENCE . . . WELL, LET ME COME AT IT THIS WAY. THE REASON I'VE LEFT COUNT TWO THERE IS THAT IT SEEMS TO ME WHAT YOU'VE GOT, WITH THE GOVERNMENT'S . . . I MEAN, GIVING CREDENCE TO ALL THE GOVERNMENT'S EVIDENCE, WHAT YOU'VE GOT IS A MAN WHO'S THE CHIEF DEPUTY, WHO DOES GET WATCHES, WHO, AT LEAST ARGUABLY, GETS A CAR, WHO, ACCORDING TO THE GOVERNMENT'S TESTIMONY, IS SORT OF THE SURROGATE TWO OR THREE TIMES, BUT WE DON'T KNOW WHICH TIMES, AND, THEREFORE, BECAUSE OF ALL OF THAT . . . AND IN THE EARLY STAGES, GOT SOME CARNE ASADA AND WHATNOT, ALTHOUGH I THINK THAT'S . . . I DIDN'T THINK THAT WAS ENOUGH TO SUSTAIN AN ENTIRE CASE AGAINST FLORES AND ZAVALA, BUT IT IS THERE FOR THIS FELLOW.

SO THAT IF YOU TAKE ALL OF THAT TOGETHER, IT WOULD SEEM TO ME, IN THE GENERAL SENSE THAT I'VE ALWAYS UNDERSTOOD CONSPIRACY LAW, ONE COULD SAY THAT HE KNEW THAT SHERIFF MARMOLEJO HAD AN ONGOING PLAN OF DOING FAVORS FOR THIS GUY IN RETURN FOR MONEY AND THAT, THEREFORE, HE WILLFULLY . . . HE KNEW ABOUT MARMOLEJO DOING THIS AT LEAST A COUPLE OF TIMES AND WILLFULLY AND DELIBERATELY JOINED IN ON THAT.

[p. 1583] NOW, THAT MAY OR MAY NOT BE FIFTH CIRCUIT LAW, BUT I'D BE WILLING TO SUBMIT IT ON THAT BASIS. BUT IT SEEMS TO ME IF I SUBMIT IT ON THAT BASIS, IT JUST HAS TO BE A "YES" OR "NO" ANSWER. I CAN'T, FOR THE LIFE OF ME, IMAGINE THEN HAVING EIGHTEEN ANSWERS AND SAYING, WELL, NOW, WHICH ONE DO YOU THINK HE WILLFULLY JOINED IN ON. BECAUSE THEN, I DON'T SEE . . . IT SEEMS TO ME IT DOESN'T MAKE ANY SENSE ANYMORE. IT DOESN'T MAKE ANY MORE SENSE THAN GOING DOWN ON COUNT ONE, NUMBER ONE, AND, NUMBER TWO, I DON'T KNOW, IN GOOD CONSCIENCE, WHAT THE JURY WOULD DO WITH THAT.

I MEAN, I DON'T KNOW WHAT COUNTS, MYSELF, HE WILLFULLY JOINED IN. ALL I COULD HONESTLY SAY IS . . . IF I WERE A JUROR AND WANTED TO BELIEVE THE GOVERNMENT'S TESTIMONY, WHAT I COULD HONESTLY SAY IS THAT HE STOOD IN FOR HIM SEVERAL TIMES, HE GOT WATCHES, HE GOT A TRUCK, AND HE'S GENERALLY

LIKE A [sic] ALTER EGO, ERGO, HE KNOWINGLY PARTICIPATED IN A GENERAL CONSPIRACY TO DO RICO. BUT IF YOU ASK ME, WELL, WHICH PREDICATE ACT, I MEAN, I DON'T SEE HOW I COULD IDENTIFY HIM. SO THAT I DON'T SEE HOW I CAN SUBMIT IT THAT WAY.

NOW, I DON'T KNOW IF YOU WANT TO . . . AND MAYBE THAT'S PUSHING THE ENVELOPE A LITTLE BIT ON WHAT FIFTH CIRCUIT LAW IS. NOW, THAT SEEMS TO BE THE LAW IN OTHER CIRCUITS, AND I THINK THAT'S PROBABLY WHAT THE LAW OUGHT TO BE, BUT I GATHER THE FIFTH CIRCUIT LAW IS A LITTLE BIT OF FLUX AND SO . . . BUT I CAN'T SUBMIT IT THIS OTHER WAY. I MEAN, IT [p. 1584] SEEMS TO ME, AS YOUR MANUAL SAYS, IN THE FIRST PLACE, IT WOULD BE HOPELESSLY CONFUSING TO THE JURY.

MR. SUROVIC: YES, SIR.

THE COURT: FOR ME TO SAY, NOW, YOU'VE GONE THROUGH ALL THESE PREDICATE ACTS, NOW WE'RE GOING TO GO THROUGH THEM ALL OVER AGAIN AND YOU TELL ME WHICH TWO, PRECISELY, THAT MARIO SALINAS JOINED IN ON. YOU KNOW, I DON'T SEE HOW THEY CAN DO THAT.

MR. SUROVIC: NO. I AGREE WITH YOU, YOUR HONOR. AS PART OF THE DEBRIEFING I GAVE YOU THIS MORNING, I ALSO INCLUDED SOME SUGGESTED AMENDED SPECIAL VERDICT FORMS.

THE COURT: WELL, HOW DO YOU PROPOSE TO DO IT NOW?

MR. SUROVIC: YOUR HONOR, MY PROPOSAL IS THAT ON BOTH, MR. MARMOLEJO AND MR. MARIO SALINAS, THAT WE PUT IT TO THEM LARGELY BY CATEGORY. I THINK THAT WOULD BE THE BEST WAY TO SAY IT. I WOULD SUGGEST THAT WE ASK THEM IF THERE WAS A CONSPIRACY TO VIOLATE, FOR EXAMPLE, RACKETEERING ACT 5 AND RACKETEERING ACT 12, THE MARIO SALINAS COUNTS THAT ARE SEPARATE AND APART AND DIFFERENT IN NATURE FROM THE GENERAL RACKETEERING ACT COUNTS CONTAINED WITH BRIG MARMOLEJO TAKING THE THOUSAND DOLLARS HERE AND THE FIVE THOUSAND DOLLARS THERE. THAT TYPE OF STUFF.

THE COURT: WELL, WAIT A MINUTE?

MR. SUROVIC: AND THE REASON I WOULD SUGGEST THE COURT HANDLE IT THAT WAY IS –

[p. 1585] THE COURT: WHICH TWO? WHICH ONES ARE YOU PULLING OUT?

MR. SUROVIC: NO. 5 WOULD BE, I BELIEVE, THE WATCHES, MARIO SALINAS TAKING THE WATCHES, AND NO. 12 IS THE TRUCK.

THE COURT: WELL, WHO WOULD'VE CONSPIRED WITH WHO ON THE TRUCK? I MEAN, THERE'S NO INDICATION AT ALL THAT THAT WAS A CONSPIRACY BETWEEN SALINAS AND MARMOLEJO.

MR. SUROVIC: WELL, YOUR HONOR, I WOULD ARGUE THAT, CIRCUMSTANTIALLY, THE JURY CAN INFER THAT MARMOLEJO KNEW THAT SALINAS WAS INVOLVED IN THAT PARTICULAR PREDICATE

ACT BECAUSE MR. SALINAS HAD FIGURED OUT HOW TO DO THAT PREDICATE ACT BY WATCHING HIM TAKE THE TRANS-AM.

THE COURT: WAIT A MINUTE WHAT NOW?

MR. SUROVIC: WELL, I BELIEVE THAT, CIRCUMSTANTIALLY, THE JURY CAN INFER THAT BRIG MARMOLEJO KNEW THAT MARIO SALINAS WAS APPROACHING HOMERO BELTRAN AND JUAN ANTONIO GUARDADO.

THE COURT: BUT WAIT A MINUTE.

MR. SUROVIC: YES, SIR.

THE COURT: WAIT A MINUTE. I'M WILLING, AND I THINK IT OUGHT TO BE, TO MAKE RICO CONSPIRACY CLOSER TO WHAT GENERAL CONSPIRACY LAW IS, BUT I'M NOT WILLING TO MAKE IT WHAT THE GENERAL CONSPIRACY LAW ISN'T. IT IS NOT A CRIME FOR ME TO KNOW THAT A FELLOW WORKER IS COMMITTING A CRIME.

[p. 1586] MR. SUROVIC: NO, SIR.

THE COURT: I MEAN, IT'S NOT EVEN A CONSPIRACY THAT I KNOW THAT SOME GUY NEXT TO ME IS TAKING BRIBES AND I KNOW IT. I MEAN, THAT DOESN'T MAKE US CONSPIRATORS, THAT DOESN'T MEAN WE HAVE A MEETING OF THE MINDS TO COMMIT THAT CRIME TOGETHER. IT SEEMS TO ME . . . AND I KNOW WHAT YOU'RE AFRAID OF, BECAUSE YOUR BOOK TELLS YOU TO BE AFRAID OF IT, THE KIND OF CASE WHERE THERE ARE A SERIES OF PREDICATE ACTS OF WHICH SOME

END UP LEGALLY INSUFFICIENT, LEGALLY INSUFFICIENT, TO WIT: THE MAIL FRAUD KIND.

MR. SUROVIC: YES, SIR.

THE COURT: THAT TURNED OUT THAT THE SUPREME COURT SAID THAT'S NOT A CRIME ANYMORE. I COULD EVEN UNDERSTAND, FOR EXAMPLE, IN THIS CASE, IF YOUR RICO COUNTS WERE HALF PREDICATED ON, SAY, 666, WHICH IS A LITTLE BIT . . . A STATUTE THAT'S A LITTLE BIT FLUX, AND THEN YOU WOULD SAY, WELL, WE WANT TO KNOW WHETHER THEY'RE PREDICATING IT ON BRIBERY OR PREDICATING IT ON 666, BUT IN THIS CASE, THE WHOLE THING IS PREDICATED ON BRIBERY. WHETHER IT'S LOANS, WHETHER IT'S MONEY, WHETHER IT'S WHATEVER, THE ENTIRE RICO . . . IT SEEMS TO ME THE ENTIRE RICO ENTERPRISE IS BASED ON THE FOLLOWING. THERE IS AN ENTERPRISE AT THE SHERIFF'S OFFICE, THE SHERIFF IS IN CHARGE OF IT, AND HE RUNS THAT ENTERPRISE IN A PATTERN OF RACKETEERING. WHY? BECAUSE HE RUNS THE SHERIFF'S OFFICE IN SUCH A WAY THAT AT LEAST TWO TIMES OR MORE, HE COLLECTS [p. 1587] FAVORS, BE IT TRUCKS, WATCHES, MONEY, OR WHATEVER, IN RETURN FOR EXERCISES OF HIS DISCRETION.

NOW, IF YOU STATE THE RICO THAT WAY, THEN IT SEEMS TO ME THAT . . . I THINK ALL I HAVE TO ASK IS, DOES SALINAS . . . IS HE AWARE OF ALL THAT. IS HE AWARE THAT SHERIFF MARMOLEJO IS RUNNING THE SHERIFF'S OFFICE IN A PATTERN OF

RACKETEERING BY AT LEAST TWO TIMES, AND PERHAPS MORE, EXERCISING HIS DISCRETION IN FAVOR OF BELTRAN IN RETURN FOR TANGIBLE BENEFITS, BE THEY MONEY, WATCHES, TRUCKS OR WHATEVER, AND KNOWING THAT, DID MARIO SALINAS REACH AN UNDERSTANDING . . . BECAUSE THE GOVERNMENT APPARENTLY TAKES THE POSITION NO OVERT ACTS ARE NEEDED.

RIGHT?

MR. SUROVIC: THAT'S CORRECT, YOUR HONOR.

THE COURT: DID MARIO SALINAS THEN REACH, IN SOME FASHION . . . AND IT DOESN'T HAVE TO BE IN WRITING AND IT DOESN'T HAVE TO BE A HANDSHAKE CEREMONY. BUT DID HE REACH A DEFINITE MEETING OF THE MINDS THAT HE WAS GOING TO BE A KNOWING, WILLFUL PARTICIPANT IN THIS SCHEME. NOT JUST TO DO ONE THING, BUT TO CONDUCT A PATTERN, TO ASSIST AND PARTICIPATE WITH AND JOIN IN WITH THE SHERIFF IN CONDUCTING THIS OFFICE AS A PATTERN OF RACKETEERING. IT SEEMS TO ME THAT IF I TELL THEM THAT, THEN THE ANSWER OUGHT TO BE SIMPLY THAT HE DOES OR HE DOESN'T.

MR. SUROVIC: I THINK YOU'RE RIGHT, YOUR HONOR. IF [p. 1588] I CAN ONLY REQUEST OF THE COURT, WHEN IT'S DESCRIBING THE PATTERN OF RACKETEERING ACTIVITY, TWO TIMES TAKING BRIBES, SO THAT IT'S DEFINED CLEARLY.

THE COURT: OKAY.

MR. SUROVIC: THAT THEY'RE MAKING A FINDING THAT HE –

THE COURT: TAKING BRIBES.

MR. SUROVIC: – CONSPIRED FOR TWO BRIBES AND NOT CONSPIRED FOR A GIFT OR SOMETHING LIKE THAT.

THE COURT: NO. THAT'S RIGHT.

MR. SUROVIC: YES, SIR.

THE COURT: YOU'RE RIGHT. IT WOULD HAVE TO BE A PATTERN, A SERIES OF BRIBE-TAKING. WHAT I MEAN WAS NOT NECESSARILY CASH ALL THE TIME. IT COULD BE CASH, IT COULD BE CARS, IT COULD BE WATCHES, IT COULD BE . . . BECAUSE THE TEXAS STATUTE SAYS "BENEFIT".

MR. SUROVIC: YES, SIR.

THE COURT: THAT'S ALL IT SAYS. IT COULD BE WATCHES, IT COULD BE WHATEVER, AND LOOK TO COUNT ONE FOR ALL THE WHATEVERS. LOOK TO ALL OF THOSE THINGS FOR THE WHATEVERS. BUT WAS HE AWARE THAT THIS SERIES OF BRIBE-TAKING, BRIBE-TAKING, WAS GOING ON BY THE SHERIFF, RUNNING THIS OFFICE IN THAT PATTERN TO ACCEPT BENEFITS IN RETURN FOR FAVORS, BRIBES, FOR BELTRAN OVER THIS PERIOD OF TIME AND KNOWING THAT, DID HE DELIBERATELY AND WILLFULLY REACH AN [p. 1589] AGREEMENT WITH THE SHERIFF THAT HE WAS GOING TO PARTICIPATE IN THAT AND HELP IN THAT AND BE PART OF THAT IN SOME FASHION.

MR. SUROVIC: ON AT LEAST TWO OCCASIONS.

MR. MORENO: ON TWO.

MR. SUROVIC: RIGHT.

THE COURT: OKAY. YOU WANT ME TO SPECIFY, "ON AT LEAST TWO OCCASIONS"?

MR. SUROVIC: RIGHT, YOUR HONOR.

THE COURT: OKAY.

MR. SUROVIC: THAT THEY DON'T HAVE TO SPECIFICALLY FIND –

THE COURT: OKAY.

MR. SUROVIC: – THE TWO OCCASIONS, BUT THAT HE KNEW THAT IT WAS GOING TO HAPPEN FOR TWO OCCASIONS.

THE COURT: ALL RIGHT.

MR. ENRIQUEZ: YOUR HONOR, IF I MAY. I BELIEVE THAT THE REASON THAT THE RICO STATUTE IS INTERPRETED IN THE FORM WHERE THEY'RE NOT TALKING ABOUT OVERT ACTS, LIKE THEY TALK IN A TRADITIONAL CONSPIRACY, IS BECAUSE THE CASES REQUIRE THAT THERE BE SPECIFIED TWO RACKETEERING ACTS THAT THEY PERSONALLY TOOK PART IN.

THE COURT: WELL, YES, FOR SUBSTANTIVE RICO. THERE'S NO QUESTION ABOUT THAT.

MR. ENRIQUEZ: AND FOR CONSPIRACY?

THE COURT: WELL, THAT'S WHAT I DON'T KNOW. THE [p. 1590] SENSE I'M GETTING IS THAT THAT'S WHERE THE SPLIT OF THE CIRCUITS IS. I'M JUST SAYING TO YOU, COUNSEL, AND I'M NOT TRYING TO HURT YOUR CLIENT, BUT IT JUST SEEMS TO ME THAT I'M EITHER NOT GOING TO DO IT AT ALL OR . . . IT EITHER DOESN'T MAKE ANY SENSE TO ME AT ALL, HOW TO DO IT, AS I'VE SAID, OR IF WE'RE GOING TO DO IT AT ALL . . . SEE, IT WOULDN'T HURT MY FEELINGS IF THE GOVERNMENT JUST SAYS, LET'S JUST DROP COUNT TWO, BECAUSE, AS I SAY, I THINK IT'S TOTALLY REDUNDANT AS TO MARMOLEJO, TOTALLY REDUNDANT.

AND AS TO SALINAS, IT'S JUST REALLY KIND OF A DIFFERENT SHOT. IT MAKES A LITTLE MORE SENSE FOR SALINAS, BUT OTHER THAN THAT, WHAT I'M SAYING IS . . . THE ONLY WAY I CAN SUBMIT IT, THAT MAKES ANY SENSE, IS . . . AND I WOULDN'T DO THIS JUST TO MAKE IT UP, EXCEPT THAT IT DOES LOOK LIKE VIRTUALLY EVERY CIRCUIT, RECENTLY, THAT'S WRITTEN ON THIS SUBJECT, WRITES ON IT THE WAY I'M TALKING ABOUT IT. AND THERE'S THIS PROBLEM THAT THERE'S SOME OLD FIFTH CIRCUIT CASES THAT ARGUABLY MEAN SOMETHING ELSE.

NOW, THE ELEVENTH CIRCUIT, SUPPOSEDLY, HAS NOW SAID THAT THE FIFTH PROBABLY NEVER MEANT THAT AND WOULDN'T MEAN IT TODAY. THAT CASE YOU ALL GAVE ME A MONTH OR TWO AGO SAYS, "WELL, WE DON'T NEED TO REACH THAT", BUT I'M JUST SAYING THAT EVEN IF I GET REVERSED ON IT, AT LEAST WE'LL GET THE LAW

CLEARED UP. BUT IT JUST DOESN'T MAKE ANY SENSE . . . IT DOESN'T MAKE ANY SENSE TO SUBMIT IT THE OTHER WAY, BECAUSE IT [p. 1591] JUST DOESN'T MAKE ANY SENSE.

MR. ENRIQUEZ: YOUR HONOR –

THE COURT: ONCE THEY'VE GONE THROUGH THE WHOLE LIST OF SUBSTANTIVE OFFENSES, IT DOESN'T MAKE ANY SENSE TO SAY, NOW FIND OUT WHICH PRECISE TWO, OTHER THAN THE ONES THEY'VE ALREADY ASKED ABOUT, 'CAUSE BY THEN I WOULD'VE ALREADY ASKED ABOUT THE TRUCK, THE WATCHES AND SO FORTH ON HIM. SO THEN WHAT I WOULD BE ASKING THEM IS, NOW GO DOWN THE PRECISE ONES FOR MARMOLEJO AND TELL ME WHICH ONES HE JOINED IN ON AND THERE'D BE NO EVIDENCE . . . TO ME, THERE'S NO EVIDENCE TO SUBMIT THAT BECAUSE I COULDN'T TELL YOU MYSELF.

MR. ENRIQUEZ: I THINK THAT'S RIGHT.

THE COURT: I COULDN'T TELL YOU RIGHT NOW WHICH ONE HE JOINED IN ON. I COULD TELL YOU THAT I THINK THERE'S EVIDENCE THAT HE WILLFULLY PARTICIPATED . . . KNEW THAT THERE WAS A SCHEME GOING ON AND JOINED IN IT, WHICH, AS FAR AS I EVER KNEW, WAS ALL THAT A CONSPIRACY REQUIRED, BUT IF YOU ASK ME WHICH TWO, NOT OF HIS BUT OF MARMOLEJO'S, DID HE JOIN IN, I'D TELL YOU . . . NOBODY COULD TELL.

MR. ENRIQUEZ: THAT'S RIGHT.

THE COURT: THERE'S NO WAY TO TELL.

MR. ENRIQUEZ: THAT'S RIGHT. THERE'S NO EVIDENCE ON THAT.

THE COURT: IN WHICH CASE, IF I WERE INTELLECTUALLY HONEST ABOUT IT, I'D JUST HAVE TO INSTRUCT HIM OUT OF COUNT [p. 1592] TWO.

MR. ENRIQUEZ: IF I COULD CITE THE COURT A 1993 NEW YORK CASE, WESTERN DISTRICT OF NEW YORK, 825 FED SUPPLEMENT, 534.

THE COURT: WRITE THAT DOWN.

(LAW CLERK COMPLYING

MR. ENRIQUEZ: 825 F-SUP, 534, WHICH CONTINUES TALKING IN TERMS OF, "AGREEING TO PARTICIPATE IN TWO PREDICATE RACKETEERING ACTS", AND THAT, APPARENTLY, IS STILL THE LAW, YOUR HONOR. AND IN THE FIFTH CIRCUIT, UNDER MARCELLO, WE STILL HAVE THAT LAW, THAT IT REQUIRES PERSONAL PARTICIPATION IN TWO RACKETEERING ACTS.

THE COURT: WELL, I'LL STUDY IT. YOU KNOW, I DID REVERSE MYSELF OVER THE WEEKEND ON THE OTHER THING. I'LL STUDY IT A COUPLE OF HOURS THIS AFTERNOON. BUT IT JUST SEEMS TO ME THAT I'M CAUGHT IN THAT DILEMMA. IT EITHER SHOULD NOT BE SUBMITTED AT ALL UNDER THAT INTERPRETATION OF THE LAW –

MR. ENRIQUEZ: I AGREE, BECAUSE THERE'S NO FACTS.

THE COURT: – OR IT SHOULD BE SUBMITTED IN WHAT, IT SEEMS TO ME, IS CLASSIC CONSPIRACY LAW. GRANTED, THE OBJECT OF THE CONSPIRACY IS A LITTLE DIFFERENT, BECAUSE HERE THE OBJECT OF THE CONSPIRACY IS A CRIME THAT REQUIRES TWO OR MORE ACTS, BUT AS LONG AS I TELL THEM THAT HE HAS TO KNOW THAT THE OBJECT OF THE CONSPIRACY IS RUNNING THE ENTERPRISE WITH A PATTERN OF RACKETEERING, INVOLVING MORE THAN TWO ACTS, KNOW-[p. 1593]ING THAT, DID HE THEN, AT SOME POINT, JOIN IN TO PARTICIPATE IN ASSISTING THAT CONSPIRACY TO BE RUN. IT SEEMS TO ME THAT'S CLASSIC CONSPIRACY LAW WITH RICO. AND WHY IT SHOULD BE ANY DIFFERENT, I DON'T KNOW. IT SEEMS TO ME THAT THE LAW IS AT LEAST IN ENOUGH OF A STATE OF FLUX THAT . . . YOU KNOW, THAT WE MIGHT AS WELL GO AHEAD AND FIND OUT.

THE ONLY WAY THAT IT'S GOING TO REALLY BE OF ANY MEANINGFUL CONSEQUENCE TO YOUR CLIENT IS IF THAT'S THE ONLY SINGLE ACT THEY . . . I MEAN, IF THAT'S THE ONLY COUNT THEY FIND HIM ON, IN WHICH CASE . . . YOU KNOW, AND WE CAN CROSS THAT BRIDGE WHEN WE GET THERE. EITHER THEY'LL ACQUIT HIM ON IT OR THEY'LL CONVICT HIM OF OTHERS, WHICH MAKES IT VIRTUALLY SUPERFLUOUS. OR IF THAT'S THE ONLY ONE, THEN WE'LL EITHER DEAL WITH IT WITH A POST-CASE MOTION OR I'LL DEAL WITH IT BY JUST LETTING YOU . . . YOU KNOW, WE CAN WORK OUT WHETHER I MAKE A RULING THAT

THAT'S A VERY VIABLE GROUNDS FOR APPEAL. WE CAN HANDLE IT THAT WAY AND SEE WHAT . . . YOU KNOW, ON AN APPELLATE BOND OR SOMETHING. BUT AT LEAST WE'LL GET AN ANSWER. AND THIS, IT SEEMS TO ME, IS AN EXCELLENT CASE TO TEST THE ANSWER, BECAUSE I THINK WE'VE GOT IT PRETTY WELL FOCUSSED.

MR. ENRIQUEZ: I'D RATHER BE ON ANOTHER CASE, YOUR HONOR, AND NOT THIS CASE.

MR. CANALES: ANOTHER POINT, YOUR HONOR.

THE COURT: WELL, NO. I WOULDN'T DO IT JUST TO DO [p. 1594] IT, EXCEPT IT SEEMS TO ME THAT I DON'T UNDERSTAND WHY THIS OTHER NOTION HAS CREPT INTO THE LAW. IT JUST SEEMS TO ME IT'S A NOTION THAT DOESN'T MAKE ANY SENSE. NOT ONLY DO YOU HAVE TO KNOW THAT A RACKETEERING PATTERN IS GOING ON AND YOU WILLFULLY JOIN IN ON SOME OCCASION TO HELP IT, BUT YOU HAVE TO ACTUALLY PICK OUT TWO ACTS AND CONSPIRE TO THEM.

I MEAN, IF THAT'S THE CASE, THERE'S NOT A HECK OF A LOT OF DIFFERENCE. THAT'S ALMOST INDISTINGUISHABLE BETWEEN CONSPIRACY AND SUBSTANTIVE. I REALLY DON'T UNDERSTAND THE SENSE OF IT, TO LIMIT IT THAT WAY. OKAY. WELL, WE'RE READY THEN?

BUT YOU GUYS, AS FAR AS TRAVEL ACT AND ALL THAT . . . WELL, LET'S SEE. DID ANYBODY SUBMIT A 666 INSTRUCTION? I CAN'T FIND ONE IN THE PATTERN BOOK.

MR. CANALES: THE GOVERNMENT DID.

MR. SUROVIC: YES, YOUR HONOR, I DID. AND I CAN PROVIDE A COPY OF IT TO THE COURT.

THE COURT: PLEASE, YES, BECAUSE . . . I MEAN, I'LL RESERVE THE RIGHT TO AMEND IT, BUT I'D SURE LIKE TO HAVE SOMETHING TO START OFF WITH.

HAVE YOU FOLKS SEEN IT?

MR. CANALES: THERE'S NOTHING IN THE PATTERN, JUDGE. I CHECKED THE –

THE COURT: IT'S NOT EVEN IN NATIONAL PATTERN BOOKS.

MR. CANALES: NO, NO. THERE'S ONE THAT HAS THE

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[p. 1714]* * * *

PASSED BY THE FEDERAL CONGRESS IN WASHINGTON, STATUTES, AND THEN SOME STATUTES ARE PASSED BY THE STATE LEGISLATURE IN AUSTIN. ALL OF THE CRIMES THAT WE'RE GOING TO DEAL WITH, ULTIMATELY, ARE FEDERAL CRIMES, BUT A COUPLE OF THESE FEDERAL CRIMES ARE BASED ON DOING CERTAIN THINGS WHILE IN THE PROCESS OF COMMITTING A STATE CRIME, OR DOING CERTAIN THINGS KNOWING THAT A STATE CRIME IS INVOLVED, AND SO WE'LL GET TO THAT IN A MINUTE. BUT THIS ONE, THIS PARTICULAR ONE, IS BASED ON A STATUTE . . . WHICH YOU SEE THERE AT THE BOTTOM. AT THE BOTTOM OF PAGE 43, IT SAYS, "IN VIOLATION OF 18 UNITED STATES CODE".

NOW, TITLE 18 OF THE UNITED STATES CODE, INCIDENTALLY, IS THE BOOK . . . AND THE UNITED STATES CODE GOES ON FOREVER AND EVER AND FEELS [sic] UP OUR SHELVES. BUT TITLE 18 IS THE ONE THAT HAS TO DO WITH ALL THE CRIMINAL LAWS THAT THE CONGRESS PASSES IN WASHINGTON, AND IN THAT BOOK, SECTION 666, HAS THIS PARTICULAR STATUTE THAT HAS TO DO WITH BRIBERY. IT'S A FEDERAL BRIBERY STATUTE THAT HAS TO DO WITH CERTAIN KINDS OF PROGRAMS OR ACTIVITIES THAT ARE FUNDED BY THE FEDERAL GOVERNMENT. THEY CAN BE STATE OR LOCAL PROGRAMS AS LONG AS THEY'RE FUNDED BY THE FEDERAL GOVERNMENT.

NOW, REMEMBER BACK WHEN WE'RE TALKING ABOUT HOW MUCH MONEY THE SHERIFF'S OFFICE

RECEIVED? I TOLD YOU THAT THAT WAS BECAUSE OF THE REQUIREMENT THAT IT HAS TO GET SO MUCH MONEY FROM THE FEDERAL GOVERNMENT IN ORDER TO QUALIFY [p. 1715] FROM THE STATUTE. SO WITH THAT IN MIND, LET'S JUST KIND OF READ THROUGH THE CHARGE AND THEN I'LL GO OVER THE ELEMENTS. FIRST OF ALL, WHAT IS DONE THERE IS THAT . . . YOU SEE THERE IT SAYS . . . THE ALLEGATIONS OF PARAGRAPHS 1 THROUGH 5 OF COUNT ONE ARE RE-INCORPORATED, AND SOME OTHER PARAGRAPHS THERE, AND THAT'S FINE; THAT'S BACKGROUND MATERIAL.

NOW, THE NEXT PARAGRAPH SETS OUT THE JURISDICTION REQUIREMENT. IT ALLEGES HERE AND STATES THAT THE HIDALGO COUNTY SHERIFF'S OFFICE IS AN AGENCY OF THE LOCAL GOVERNMENT OF HIDALGO COUNTY, TEXAS AND THAT IT RECEIVED FEDERAL ASSISTANCE OF MORE THAN TEN THOUSAND DOLLARS DURING A ONE YEAR PERIOD BEGINNING JUNE 1 OF '91 AND GOING TO JUNE 1 OF '92, AND UNDER THE STATUTE, ANY TWELVE MONTH PERIOD CAN . . . IT DOESN'T HAVE TO BE FROM JANUARY TO DECEMBER. IT CAN BE ANY TWELVE MONTHS.

SO FOR COUNT THREE, WE'RE TALKING ABOUT . . . IN OTHER WORDS, THIS IS BASICALLY COVERING . . . TO TALK IN TERMS OF THIS CASE HERE, COUNT THREE BASICALLY COVERS HIS FIRST STAY IN THE JAIL, WHICH IS, AS YOU RECALL, FROM JUNE . . . I THINK IT WAS ROUGHLY JUNE TO . . .

WHAT WAS IT, NOVEMBER OR SOMETHING?

MR. SUROVIC: APRIL, YOUR HONOR.

THE COURT: JUNE TO APRIL, JUNE '91 TO APRIL OF '92, AND THEN THE SECOND STAY WAS LATER THAT YEAR, NOVEMBER OF '92 TO THE SPRING OF '93, AND THAT'S GOING TO BE COUNT FOUR. [p. 1716] EVERYTHING I'M GOING TO TELL YOU ABOUT COUNT THREE IS IDENTICAL TO COUNT FOUR, EXCEPT THAT IT'S A DIFFERENT TIME FRAME. OKAY. SO WHAT IT SAYS HERE IS THAT FOR COUNT THREE, WE'RE GOING TO LOOK AT A PERIOD OF JUNE 1 OF '91 TO JUNE 1 OF '92.

SO FIRST OF ALL, THE GRAND JURY ALLEGES THAT DURING THAT TIME, THE SHERIFF'S OFFICE WAS AN AGENCY OF HIDALGO COUNTY AND DID RECEIVE, DURING THAT TIME, TEN THOUSAND DOLLARS OF FEDERAL ASSISTANCE. OKAY? NOW, THE EVIDENCE THERE IS NOT TERRIBLY DISPUTED. IN FACT, IT WAS NOT ONLY TEN THOUSAND A YEAR. IT WAS SOMETHING LIKE SEVENTY THOUSAND A MONTH, ACCORDING TO THE EVIDENCE. BUT ANYWAY, YOU HAVE TO BE SATISFIED THAT IT'S AT LEAST TEN THOUSAND A YEAR.

NOW, WITH THAT IN MIND, WITH PARAGRAPH TWO AS A BACKGROUND, THEN PARAGRAPH THREE ALLEGES THAT FROM A PERIOD OF OCTOBER 1 OF '91 TO APRIL 14 OF '92, WHICH IS GENERALLY WHEN BELTRAN WAS IN JAIL, DURING THAT PERIOD, THAT DURING THAT TIME, THESE TWO DEFENDANTS – AND THEN HERE COMES THE WORDS OF THE STATUTE. IF YOU'LL LOOK AFTER THEIR NAME, "DID KNOWINGLY AND CORRUPTLY

SOLICIT, DEMAND, ACCEPT AND AGREED TO ACCEPT SOMETHING OF VALUE". NOW, THAT'S THE KEY PHRASE, "SOMETHING OF VALUE", FROM HOMERO BELTRAN-AGUIRRE. AND HERE'S THE NEXT KEY PHRASE, "INTENDING TO BE INFLUENCED . . . INTENDING TO BE INFLUENCED OR REWARDED IN CONNECTION WITH A BUSINESS TRANSACTION OR SERIES OF TRANSACTIONS OF THE SHERIFF'S OFFICE INVOLVING A VALUE OF FIVE THOUSAND DOLLARS OR [p. 1717] MORE".

NOW, LET ME TRY TO BREAK DOWN SOME OF THAT FOR YOU. "FEDERAL ASSISTANCE", INCIDENTALLY, FOR PURPOSES OF THE STATUTE . . . AND THESE ARE DEFINITIONS ON THE STATUTE. "FEDERAL ASSISTANCE" MEANS ANY GRANT OR CONTRACT. IT INCLUDES CONTRACTS. ANY GRANT, CONTRACT, LOAN, INSURANCE OR OTHER FORM OF BENEFIT SUPPLIED BY THE UNITED STATES GOVERNMENT. AND AS TO WHETHER THESE DEFENDANTS ARE AGENTS OF THE SHERIFF'S OFFICE, "AN AGENT" SIMPLY MEANS A PERSON WHO IS AN EMPLOYEE OF THE AGENCY OR IS AUTHORIZED TO ACT FOR THE AGENCY. AND THE STATUTE SPEAKS IN TERMS OF A GOVERNMENTAL AGENCY, WHICH CAN SIMPLY BE ANY BRANCH OF THE GOVERNMENT. IT CAN BE THE EXECUTIVE BRANCH, THE JUDICIAL BRANCH, THE LEGISLATIVE BRANCH. AND THE STATUTE ALSO INCLUDES STATE OR LOCAL.

SO YOU HAVE STATE AGENCIES AND THEN YOU HAVE LOCAL, WHICH WOULD BE ANY POLITICAL SUBDIVISION OF A STATE, WHICH WOULD INCLUDE

A COUNTY OR CITY OR THAT SORT OF THING. THE TERM "ONE YEAR PERIOD" IN THE STATUTE MEANS ANY TWELVE MONTH PERIOD BEGINNING NO EARLIER THAN TWELVE MONTHS BEFORE THE OFFENSE OR ENDING NO LATER THAN TWELVE MONTHS AFTER THE OFFENSE.

SO IN THIS CONNECTION, I WOULD INSTRUCT YOU THAT THE HIDALGO COUNTY SHERIFF'S OFFICE IS, OF COURSE, AN AGENCY OF HIDALGO COUNTY AND, THEREFORE, IT IS A SUBDIVISION OF THE GOVERNMENT OF THE STATE OF TEXAS UNDER . . . FOR PURPOSES [p. 1718] OF THE STATUTE. AND THERE'S NO DISPUTE THAT DEFENDANTS MARMOLEJO AND SALINAS WERE AGENTS OF THE SHERIFF'S OFFICE DURING THAT TIME.

SO HERE ARE THE ELEMENTS OF THIS OFFENSE. HERE'S WHAT THE GOVERNMENT HAS TO PROVE TO YOU. IT'S THREE THINGS. NUMBER ONE, THAT THESE DEFENDANTS, DURING THAT TIME PERIOD, IN OTHER WORDS, DURING THE PERIOD OF JUNE 1 TO '91, WERE, IN FACT, AGENTS OF EITHER A STATE GOVERNMENT OR A LOCAL GOVERNMENT OR ANY AGENCY OF THE STATE OR LOCAL GOVERNMENT, IN THIS CASE, THE WEBB COUNTY SHERIFF'S OFFICE. THAT THE WEBB COUNTY SHERIFF'S OFFICE IS AN AGENCY OF –

MR. MORENO: YOUR HONOR, YOU KEEP SAYING "WEBB COUNTY".

THE COURT: I'M SORRY. HIDALGO COUNTY. FORGIVE ME. THE HIDALGO COUNTY SHERIFF'S OFFICE IS, IN FACT, AN AGENCY OF GOVERNMENT.

THAT IT'S AN AGENCY OF THE COUNTY, WHICH IS A SUBDIVISION OF THE STATE, AND THAT, IN FACT, THEY WERE AGENTS OF THE HIDALGO COUNTY SHERIFF'S OFFICE. THAT'S NUMBER ONE.

NUMBER TWO, YOU HAVE TO BE SATISFIED FROM THE EVIDENCE THAT FROM JUNE 1 OF '91 TO JUNE 1 OF '92, THAT DURING THAT PERIOD OF TIME, THAT THE HIDALGO COUNTY SHERIFF'S OFFICE RECEIVED AT LEAST TEN THOUSAND DOLLARS IN FEDERAL ASSISTANCE, IN FEDERAL MONEY, BY WAY OF A GRANT OR A CONTRACT.

THEN, NUMBER THREE, AND THIS IS REALLY THE . . . THIS IS THE PART THAT'S BEYOND THE TECHNICAL REQUIREMENTS. [p. 1719] THAT THESE DEFENDANTS DID EITHER SOLICIT, WHICH IS ASKED FOR, OR DEMAND, OR ACCEPT OR AGREE TO ACCEPT FROM BELTRAN ANYTHING OF VALUE, ANYTHING OF VALUE. FOR PURPOSES OF THIS STATUTE, IT CAN BE ANYTHING OF VALUE, MONEY, CARS, WATCHES, FOOD, ANYTHING OF VALUE INTENDING TO BE INFLUENCED.

NOW, THAT WOULD BE THE NEXT CRITICAL ITEM HERE, INTENDING TO BE INFLUENCED, THAT THEY RECEIVED ANYTHING OF VALUE INTENDING TO BE INFLUENCED IN CONNECTION WITH ANY BUSINESS OR TRANSACTION OF THE SHERIFF'S OFFICE OR SERIES OF TRANSACTIONS INVOLVING MORE THAN FIVE THOUSAND DOLLARS.

NOW, FOR PURPOSES OF THE STATUTE, THE ACTUAL MONEY THAT EXCHANGED HANDS, IF ANY, DOES NOT HAVE TO BE NECESSARILY ANY

PART OF THE FEDERAL MONEY. IN OTHER WORDS, THERE'S NO EFFORT HERE TO TRY TO SHOW EXACTLY WHERE THE FEDERAL MONEY GOES AND THE BUDGET VERSUS ANY MONEY. THAT'S NOT NECESSARY. THE ONLY THING THAT'S NECESSARY IS THAT, IN FACT, THIS IS AN AGENCY THAT RECEIVES TEN THOUSAND DOLLARS DURING THAT YEAR PERIOD; THAT IT IS AN AGENCY OF GOVERNMENT; THAT THESE TWO DEFENDANTS ARE AGENTS OF THAT AGENCY; AND THAT DURING THIS PERIOD OF TIME, THEY CORRUPTLY RECEIVED . . . THEY SOLICITED AND/OR RECEIVED. IT SAYS "AND" IN THE INDICTMENT; IT CAN BE EITHER ONE. THEY CORRUPTLY SOLICITED AND/OR RECEIVED ANYTHING OF VALUE, MONEY, CARS, WATCHES, MERCHANDISE, BUT INTENDING TO BE INFLUENCED OR REWARDED. IN OTHER WORDS, THAT'S . . . AS THE CASE IS SHAPING UP HERE, THAT WOULD BE KIND [p. 1720] OF THE CRITICAL DECISION FOR YOU HERE, DID THEY RECEIVE THOSE THINGS INTENDING TO BE REWARDED OR INFLUENCED IN CONNECTION WITH ANY OF THE TRANSACTIONS OF THE SHERIFF'S OFFICE INVOLV1ING A VALUE OF FIVE THOUSAND DOLLARS OR MORE.

NOW, LET ME SPEAK TO YOU ABOUT THE FIVE THOUSAND DOLLARS. IN THIS PARTICULAR CASE, THE ALLEGATION IS THAT THEY WERE INTENDING TO BE INFLUENCED WITH RESPECT TO CONTACT VISITS. NOW, CONTACT VISITS IS AN INTANGIBLE. THAT'S NOT LIKE . . . THAT'S NOT THE SAME AS, SAY, TAKING A BRIBE TO AWARD SOMEBODY A CONTRACT OR GIVE SOMEBODY SOMETHING, IN WHICH

CASE, YOU CAN PRETTY MUCH PUT A VALUE ON IT. IN THIS CASE, CONTACT VISIT IS WHAT WE CALL "AN INTANGIBLE". I MEAN, THERE'S NO MARKET VALUE AS SUCH FOR A CONTACT VISIT, BUT YOU ARE . . . YOU DO HAVE THE POWER TO DECIDE WHAT IS THE VALUE OF CONTACT VISITS OF THOSE SERIES OF TRANSACTIONS. AND IT WOULD BE THE SAME THAT YOU WOULD EVALUATE ANY OTHER INTANGIBLE ITEM. IN FACT, IF YOU BELIEVE THAT MONEY WAS EXCHANGED, IF YOU BELIEVE THAT MONEY OR PROPERTY OR THINGS OF VALUE WERE EXCHANGED, YOU CAN LOOK AT THOSE THEMSELVES AS, IN EFFECT, SETTING THE VALUE OF THE SERIES OF TRANSACTIONS.

SO LET ME KIND OF SUMMARIZE. IN OTHER WORDS, THE STATUTE TRIES TO PUT TWO LIMITS ON WHEN THE FEDERAL JURISDICTION COMES IN. ONE LIMIT IS THAT IT HAS TO BE AN AGENCY THAT RECEIVES A CERTAIN AMOUNT OF FEDERAL MONEY. SO THAT'S ONE LIMIT AT THE TOP. IT HAS TO RECEIVE TEN THOUSAND [p. 1721] DOLLARS OR MORE DURING A YEAR. AND THERE'S NO DISPUTE THE HIDALGO SHERIFF'S OFFICE RECEIVES THAT MUCH DURING THE YEAR. BUT THE NEXT LIMIT ON JURISDICTION IS THAT THE TRANSACTIONS FOR WHICH THE DEFENDANTS . . . IF YOU BELIEVE THEY WERE SOLICITING OR ACCEPTING THINGS OF VALUE, YOU HAVE TO BELIEVE THAT THE TRANSACTIONS THEMSELVES, THE SERIES OF TRANSACTIONS, WERE ENOUGH TO HAVE A VALUE OF MORE THAN FIVE THOUSAND DOLLARS.

NOW, OF COURSE, WHAT WE'RE TALKING ABOUT HERE IS THIS, AND THIS IS REALLY WHAT YOU'RE GOING TO HAVE TO DECIDE. THOSE ARE THE LEGAL TERMS, BUT THIS IS WHAT WE'RE TALKING ABOUT. WHAT THE GOVERNMENT IS SAYING IS THAT DURING THAT PERIOD OF TIME, THE DEFENDANTS WERE SOLICITING AND RECEIVING CARS, WATCHES AND MONEY, AMONG OTHER THINGS, EVEN LEAVING ASIDE WHATEVER MEAT OR ANYTHING LIKE THAT, AND CANDY. BUT CARS, MONEY, WATCHES AND SO FORTH THAT OVER THE COURSE OF THE YEAR, ESPECIALLY OVER THE COURSE OF OCTOBER 1, 1991 TO APRIL 14, 1992, DID HAVE A VALUE OF MORE THAN FIVE THOUSAND DOLLARS, BY THE VERY NATURE THAT THAT'S THE PRICE THAT WAS PUT ON THEM. IT WAS A SERIES OF TRANSACTIONS AND THAT THEY WERE INTENDING TO BE INFLUENCED OR REWARDED IN HANDLING THESE TRANSACTIONS.

NOW, WHAT ARE THE TRANSACTIONS? THE TRANSACTIONS ARE ALLOWING CONTACT VISITS. SO THAT, THEREFORE, THEY SOLICITED, ACCEPTED OR AGREED TO ACCEPT THINGS OF VALUE, INTENDING TO BE INFLUENCED IN A SERIES OF TRANSACTIONS, SPE-[p. 1722]CIFICALLY, A SERIES OF TRANSACTIONS ON THESE CONTACT VISITS, THAT HAD A VALUE OF MORE THAN FIVE THOUSAND DOLLARS.

NOW, IF YOU ACCEPT THE GOVERNMENT'S THEORY, WELL, THEN, OF COURSE, THEY HAD A VALUE OF MORE THAN FIVE THOUSAND DOLLARS IN THIS FIRST TIME FRAME. IN EITHER TIME FRAME. EITHER

TIME FRAME YOU WANT TO TAKE, YOU CAN ADD UP THE MONEY AND IT COMES INTO WELL ABOVE FIVE THOUSAND OF EITHER CARS OR WATCHES OR CASH AND IT WOULD RUN INTO SIGNIFICANTLY MORE THAN THAT IN EITHER OF THESE TWO TIME FRAMES. "INTENDING TO BE INFLUENCED OR REWARDED?" WELL, THAT'S THE GOVERNMENT'S THEORY, THAT THEY TOOK THE MONEY INTENDING TO BE INFLUENCED OR REWARDED IN A TRANSACTION AT THE SHERIFF'S OFFICE, A SERIES OF TRANSACTIONS, TO-WIT: CONTACT VISITS.

NOW, THE DEFENSE THEORY HERE IS THE SAME AS IT IS IN ALL OF THEM AND THIS CUTS ACROSS ALL THESE CASES. THAT MAYBE THEY DID TAKE CERTAIN THINGS OF VALUE, AND IN THIS CASE, THEY WOULD NOT DISPUTE THAT THE HIDALGO COUNTY RECEIVED SO MUCH MONEY OR THAT THERE WERE A SERIES OF TRANSACTIONS, BUT THEIR VIEW HERE, AS I UNDERSTAND IT, WOULD BE, WE DID NOT TAKE ANYTHING INTENDING TO BE INFLUENCED OR REWARDED. SO THAT WOULD BE THAT PARTICULAR CASE.

NOW, LET ME SAY ONE FINAL THING AND THAT TAKES CARE OF BOTH OF THESE COUNTS. AS I UNDERSTAND THE EVIDENCE, AT LEAST, IF YOU BELIEVE THE GOVERNMENT'S . . . IF YOU GO WITH THE GOVERNMENT'S VERSION OF THIS EVIDENCE, AND I'M TALKING [p. 1723] ABOUT JUST THE VALUE, THERE WOULD BE LITTLE DOUBT THAT DURING THE COURSE OF OCTOBER OF '91 TO APRIL OF '92, THAT AT LEAST SHERIFF MARMOLEJO . . . THAT HE WAS INVOLVED IN A SERIES OF TRANSACTIONS

INVOLVING A VALUE OF FIVE THOUSAND DOLLARS OR MORE. MARIO SALINAS DIRECTLY . . . AND I'M NOT SURE THE EVIDENCE WOULD PLACE HIM DIRECTLY INVOLVED IN A SERIES OF TRANSACTIONS INVOLVING FIVE THOUSAND OR MORE, BUT THE THEORY IN HIS CASE, AND THIS IS TRUE, TO A CERTAIN EXTENT, IN A COUPLE OF THESE OTHER CHARGES, IS THAT ALTHOUGH HE MAY NOT HAVE BEEN HIMSELF DIRECTLY INVOLVED IN BEING INFLUENCED IN A SERIES OF TRANSACTIONS OF MORE THAN FIVE THOUSAND DOLLARS, THAT HE WAS DELIBERATELY AIDING AND ABETTING THE SHERIFF TO DO THAT.

NOW I WILL SIMPLY TELL YOU WHAT IS THE LAW OF AIDING AND ABETTING. THE LAW IS THAT ANYTHING YOU CAN DO DIRECTLY, YOU CAN ALSO DO BY HELPING SOMEBODY ELSE, AND THE LAW IS THAT IF YOU KNOW THAT SOMEBODY ELSE IS COMMITTING A CRIME AND YOU DELIBERATELY AND WILLFULLY HELP HIM COMMIT THAT CRIME IN ORDER TO HELP HIM SUCCEED IN COMMITTING THE CRIME, THEN YOU YOURSELF ARE GUILTY OF THE CRIME JUST AS HE IS.

NOW, BEFORE YOU CAN MAKE THAT KIND OF A FINDING, YOU HAVE TO BE SATISFIED THAT MARIO SALINAS KNEW WHAT KIND OF CRIMINAL ACTIVITY, IF ANY, WAS GOING ON. THAT HE KNEW THE FACTS, HE KNEW THE CIRCUMSTANCES, AND THEN KNOWING THAT, IN OTHER WORDS, KNOWING THAT THERE WAS A SERIES OF TRANSACTIONS INVOLVING MORE THAN FIVE THOUSAND DOLLARS IN [p. 1724] WHICH THINGS WERE BEING GIVEN OF

VALUE FOR THE INTENT TO INFLUENCE DECISIONS, KNOWING ALL OF THAT, THAT HE DID JOIN IN AND DELIBERATELY HELPED OR ASSIST AT LEAST SOME TIMES IN ORDER TO HELP THAT OUT.

NOW, AGAIN, THE GOVERNMENT'S THEORY HERE IS THAT AT LEAST ON SEVERAL OCCASIONS, KNOWING WHAT WAS GOING ON, THAT HE WAS THE STAND-IN. HE WAS THE SORT OF BACK-UP GUY TO MAKE THE ARRANGEMENT SOME TIMES. EVEN THOUGH HE DIDN'T GET PERHAPS AS MUCH VALUE AS THE SHERIFF, DID NOT RECEIVE AS MANY THINGS OF VALUE, THAT HE DID RECEIVE SOME THINGS OF VALUE, BUT THAT HE KNEW WHAT THE SHERIFF WAS DOING AND THAT AT LEAST ON CERTAIN OCCASIONS, WILLFULLY AND DELIBERATELY JOINED IN TO HELP OUT.

NOW, YOU HAVE TO BE SATISFIED OF ALL THAT BEYOND A REASONABLE DOUBT BEFORE YOU CAN MAKE THAT FINDING. NOW, NOTICE THAT YOU CANNOT HOLD MR. SALINAS ON AN AIDING AND ABETTING CHARGE UNLESS YOU ARE SATISFIED THAT HE KNEW THE FACTS AND WILLFULLY JOINED IN WITH THE INTENT TO HELP COMMIT THIS TYPE OF CRIME. IN OTHER WORDS, IT IS NOT ENOUGH JUST THAT HE WORKS THERE. IT IS NOT ENOUGH JUST THAT THEY KNOW EACH OTHER. IT'S NOT ENOUGH THAT HE MAY HAVE HELPED OUT FROM TIME TO TIME INNOCENTLY. IN OTHER WORDS, HE DOES WORK THERE, HIS DUTIES ARE THERE, AND SO HE WOULD NOT BE AN AIDER AND ABETTER. HE WOULD NOT BE A PARTY TO A CRIME IF HE WAS DOING NORMAL DUTIES OR JUST HELPING OUT

WITH INSTRUCTIONS AND SO [p. 1725] FORTH, NOT KNOWING WHAT WAS GOING ON, NOT HAVING THE UNDERSTANDING OF WHAT THE CRIMINAL ACT WAS, AND NOT WANTING TO HELP COMMIT A CRIME.

NOW, HAVING SAID ALL THAT, I'M NOT TRYING TO SUGGEST TO YOU THAT I'M SAYING THAT THAT MEANS THAT SHERIFF MARMOLEJO WAS COMMITTING A CRIME. I'M SIMPLY SAYING THAT BY THE EVIDENCE HERE, AS FAR AS THE AMOUNT OF TRANSACTIONS, THERE IS EVIDENCE THERE THAT IF YOU WANT TO BELIEVE IT, WOULD HAVE A LOT OF DIRECT ONE-ON-ONE . . . ALLEGEDLY FROM THE GOVERNMENT WITNESSES, DIRECT ONE-ON-ONE TRANSACTIONS BETWEEN BELTRAN AND HIS AGENT AND SHERIFF MARMOLEJO THAT WOULD EASILY GET TO A SERIES OF TRANSACTIONS OF MORE THAN FIVE THOUSAND DOLLARS.

NOW, THAT DOESN'T MEAN YOU HAVE TO BELIEVE THAT. AND, OF COURSE, IF YOU DON'T BELIEVE THAT, WHY, THEN NEITHER ONE OF THEM ARE GUILTY OF THAT OFFENSE AT ALL, BECAUSE THEN THEY EITHER WERE NOT TAKING ANYTHING OR THEY WERE NOT TAKING . . . OR AT LEAST THEY WERE NOT TAKING ANYTHING OR THEY WERE NOT TAKING IT WITH ANY INTENT TO BE INFLUENCED OR REWARDED IN ANY OF THEIR DECISIONS HAVING TO DO WITH THE SHERIFF'S OFFICE. SO THAT'S COUNT THREE.

NOW, IF YOU'LL JUST FLIP THE PAGE AND LOOK AT COUNT FOUR, COUNT FOUR IS ABSOLUTELY

IDENTICAL. THE ONLY DIFFERENCE IS THAT WE NOW SHIFT TO . . . WE NOW SHIFT THE PERIOD. IN OTHER WORDS, FOR THE PERIOD OF DECIDING WHETHER [p. 1726] THE AGENCY RECEIVED TEN THOUSAND DOLLARS OR NOT, WE NOW ARE LOOKING AT SEPTEMBER 1, 1992 TO SEPTEMBER 1 OF 1993.

NOW, AGAIN, THAT PART IS KIND OF EASY, BECAUSE AS I UNDERSTAND THE EVIDENCE, THEY WERE ALL . . . THE SHERIFF'S AGENCY . . . THE AGENCY WAS ALWAYS RECEIVING PLENTY OF FEDERAL MONEY. SO YOU MAY NOT HAVE MUCH OF A PROBLEM THERE AS FAR AS DECIDING THAT THE AGENCY STILL RECEIVED TEN THOUSAND DOLLARS DURING THAT PERIOD ALSO. BUT NOW WE HAVE A DIFFERENT PERIOD OF OCTOBER OF '92 TO JULY OF '93 IN WHICH . . . FOR YOU TO DECIDE WHETHER EITHER OR BOTH OF THESE DEFENDANTS AGAIN WERE RECEIVING SOMETHING OF VALUE WITH THE INTENT TO BE INFLUENCED OR REWARDED IN CONNECTION WITH THE BUSINESS OF THE OFFICE OVER A SERIES OF TRANSACTIONS THAT HAD A VALUE OF FIVE THOUSAND DOLLARS OR MORE.

NOW, AGAIN . . . AND I'M NOT ENDORSING THIS OR NOT. I'M JUST SAYING THAT THE GOVERNMENT EVIDENCE WOULD INDICATE, IF YOU BELIEVE THE GOVERNMENT EVIDENCE, THAT THERE WERE A SERIES OF TRANSACTIONS ON BOTH HALVES, BOTH TIME PERIODS, THAT HAD A VALUE OF MORE THAN FIVE THOUSAND DOLLARS IF YOU ADD UP EITHER THE WATCHES OR THE CAR OR THE MONEY OR THE INSTALLMENT PAYMENTS AND SO FORTH. ALL OF

THAT, THAT YOU'VE HEARD, IF YOU ACCEPT ALL OF THAT, WELL, THEN THE FIVE THOUSAND DOLLARS IS NOT A DIFFICULT FIGURE TO ACHIEVE. AND, OBVIOUSLY, IF YOU DO NOT ACCEPT THAT TESTIMONY, WELL, THEN YOU DO NOT ACCEPT THAT TESTIMONY AND THEN THERE MAY BE NO [p. 1727] FIVE THOUSAND DOLLARS. AND FOR THAT MATTER, THEN IT'S THE OTHER KEY ELEMENT, THAT THEY WERE NOT RECEIVING IT WITH THE INTENTION TO BE INFLUENCED IN THEIR DECISIONS IN CONNECTION WITH THE TRANSACTIONS OF THE OFFICE. BUT ANYWAY, THAT'S COUNTS THREE AND FOUR.

NOW, LET'S TURN TO THE LAST ONE. AND I THINK I ALREADY TOLD YOU THIS. YOU CAN VOTE ON THESE COUNTS IN ANY ORDER YOU WANT TO, BUT I'M GOING TO EXPLAIN THEM IN WAYS THAT I THINK IS EASIER FOR ME TO EXPLAIN TO YOU. LET'S TAKE THE LAST ONE ON PAGE 47, AND THAT'S THE SO CALLED TRAVEL COUNT. AND BEFORE WE TAKE THAT ONE UP, LET ME EXPLAIN TO YOU VERY CAREFULLY, AND PLEASE LISTEN TO THIS. AND YOU CAN LOOK AT THAT OVER THERE, THAT ONE OF THE DEFENDANTS PUT UP THERE, THAT LOWER GRAPH THERE. THAT IS THE DEFINITION OF BRIBERY UNDER TEXAS LAW.

NOW, THIS STATUTE I JUST TOLD YOU ABOUT A MINUTE AGO IS ESSENTIALLY A FEDERAL BRIBERY STATUTE THAT SAYS YOU RECEIVE ANYTHING OF VALUE IN RETURN FOR INTENDING TO BE INFLUENCED. THE TEXAS STATUTE IS SIMILAR TO THAT; IT JUST HAS DIFFERENT WORDING. BUT THAT'S IT

THERE. WHAT THEY'VE SHOWN YOU THERE IS CORRECT, BUT LET ME JUST GO OVER THAT WITH YOU.

WHAT THAT PARTICULAR STATUTE MAKES A CRIME . . . AND THAT'S A TEXAS STATUTE. IT MAKES IT A CRIME . . . AND HERE ARE THE ELEMENTS OF IT. NUMBER ONE, IF YOU ARE A PUBLIC

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[p. 1765]* * *

AGE. SO JUST PASS ON THE PREDICATE ACTS THE WAY THEY ARE, BUT I'M WARNING YOU THAT SOME OF THEM . . .

FOR EXAMPLE, LET'S JUST PICK ANY OF THEM. FOR EXAMPLE, TURN TO PAGE 13. AT THE BOTTOM OF THE PAGE, YOU'LL SEE RACKETEERING ACT NO. 9, AND IF YOU TURN THE PAGE, TO PAGE 14, RACKETEERING ACT NO. 9 IS REALLY A, B, C, AND D AND IT GOES ALL THE WAY OVER TO THE NEXT PAGE BEFORE YOU GET TO NO. 10. SO IN RACKETEERING ACT NO. 9, THE GRAND JURY CHARGED IT AND SO YOU JUST HAVE TO TAKE IT . . . "YES" OR "NO" AS A PACKAGE AND THE PACKAGE IS A SERIES OF ONE THOUSAND DOLLAR PAYMENTS IN APRIL, APRIL 1, APRIL 4, APRIL 8, AND APRIL 11. SO THERE, YOU'RE GOING TO HAVE TO JUST DO "YES" OR "NO". IF YOU DON'T FIND THOSE OCCURRED, WELL, THEN – OR ALL OF THEM OCCURRED, WELL, THEN IT'S NO; IF YOU FIND ALL OF THEM OCCURRED, IT'S YES.

NOW, AS YOU GO THROUGH EACH OF THESE PREDICATE ACTS, THOSE ALSO HAVE TO BE UNANIMOUS, AND I'LL GET BACK TO THAT AT THE END. JUST LIKE ON THE MONEY LAUNDERING OR ANYTHING ELSE, WHICH HAS TO BE UNANIMOUS, ON THIS ONE, EACH ACT HAS TO BE UNANIMOUS. ON PREDICATE ACT NO. 1, YOU HAVE TO UNANIMOUSLY AGREE, "YES" OR "NO". IT HAS TO BE UNANIMOUS. PREDICATE ACT NUMBER – NOT NO. 1. WE DON'T HAVE NO. 1. BUT NO. 2, NO. 3, NO. 4,

ALL OF THOSE HAVE TO BE UNANIMOUS IN ORDER TO FIND THAT THEY EXIST.

NOW, FINALLY, COUNT NO. 2. WHAT COUNT NO. 2 [p. 1766] CHARGES IS A CONSPIRACY BETWEEN MARMOLEJO AND SALINAS TO COMMIT RICO. IN OTHER WORDS, COUNT ONE, THE RACKETEERING ACT, IS WHAT IS CALLED "RICO". IT'S THE RACKETEERING . . . WHATEVER "RICO" STANDS FOR. ANYWAY, IT STANDS FOR . . . IT'S SHORTHAND FOR THE RICO RACKETEERING SOMETHING OR OTHER, OR INTERSTATE SOMETHING OR OTHER. BUT IT'S THE RICO, R-I-C-O. AND THAT'S COUNT ONE. ON COUNT TWO, INSTEAD OF CHARGING THAT THEY ACTUALLY COMMITTED RICO, IT CHARGES THAT THEY AGREED TO DO IT. IN OTHER WORDS, IT'S A SEPARATE OFFENSE. IT CHARGES THAT THEY CONSPIRED TO COMMIT THE RACKETEERING INFLUENCED CORRUPT ORGANIZATION ACT, "RICO".

NOW, WHAT'S A CONSPIRACY? A CONSPIRACY IS AN AGREEMENT BETWEEN TWO PEOPLE. IT'S AN AGREEMENT TO DO SOMETHING ILLEGAL. IT'S AN AGREEMENT TO BREAK THE LAW. YOU CAN HAVE A CONSPIRACY TO DO ALMOST ANYTHING. YOU CAN HAVE A CONSPIRACY TO ROB A BANK, YOU CAN HAVE A CONSPIRACY TO KIDNAP SOMEBODY, YOU CAN HAVE A CONSPIRACY TO DO DRUG DEALING, BUT IN THIS CASE, THE ONLY CONSPIRACY THAT YOU'RE FOCUSSING ON, THE ONLY CONSPIRACY WE'RE TALKING ABOUT, IS A CONSPIRACY TO COMMIT RICO. SO THE GOVERNMENT IS CHARGING THAT THESE TWO GENTLEMEN OVER HERE

REACHED AN AGREEMENT TO VIOLATE THE RACKETEERING ACT. AND THAT'S WHAT A CONSPIRACY IS. IT'S A COMBINATION BETWEEN AT LEAST TWO PEOPLE TO AGREE TO DO SOMETHING ILLEGAL.

NOW, THE GOVERNMENT WOULD NOT HAVE TO PROVE TO [p. 1767] YOU THAT THEY SAT DOWN AND DRAFTED A CONTRACT AND THE GOVERNMENT DOESN'T HAVE TO PROVE THAT THEY SAT DOWN AND HAD SOME KIND OF HANDSHAKE AGREEMENT OR SOMETHING, BUT THE GOVERNMENT DOES HAVE TO PROVE TO YOU THAT THEY REACHED AN UNDERSTANDING, A MEETING OF THE MINDS, THAT THEY WERE GOING TO WORK TOGETHER AND COMMIT THIS OFFENSE. IN OTHER WORDS, TOGETHER, THEY WERE GOING TO OPERATE THE SHERIFF'S OFFICE IN A PATTERN OF RACKETEERING, IN A RELATED SERIES OF BRIBES FROM BELTRAN AND HIS ASSOCIATE, GUARDADO, IN RETURN FOR DOING THINGS FOR HIM, THAT THEY WERE GOING TO ENGAGE IN THIS PATTERN OF CONDUCT. SO COUNT TWO ADDRESSES THE AGREEMENT ITSELF.

SO WHAT THE GOVERNMENT HAS TO PROVE IS THAT THE TWO OF THESE GENTLEMEN REACHED AN AGREEMENT WITH EACH OTHER THAT THEY WERE GOING TO RUN THE SHERIFF'S OFFICE THROUGH A PATTERN OF RACKETEERING ACTS, THAT THEY WERE GOING TO RUN THE SHERIFF'S OFFICE THROUGH A SYSTEM OF COLLECTING BRIBES FROM ONE OF THESE PRISONERS IN RETURN FOR DOING FAVORS FOR HIM, AND THAT EACH OF THE DEFENDANTS KNEW THAT THAT WAS THE

IDEA AND THAT EACH OF THEM WILLFULLY JOINED IN.

NOW, YOU CAN BECOME A MEMBER OF A CONSPIRACY EVEN IF YOU DON'T KNOW ALL OF THE DETAILS, AS LONG AS YOU KNOW THE ESSENCE OF WHAT THE ILLEGALITY OF IT IS. SO IF EITHER DEFENDANT UNDERSTANDS THAT THIS IS AN UNLAWFUL SCHEME AND HE UNDERSTANDS THE NATURE OF IT, HE UNDERSTANDS EXACTLY THAT IT'S A PLAN TO RUN THE SHERIFF'S OFFICE WITH A PATTERN [p. 1768] OF RACKETEERING, AND THEREAFTER DELIBERATELY JOINS IN AND HELPS OUT, EVEN ON A SMALLER SCALE, EVEN IF HE'S NOT INVOLVED ALL THE TIME, EVEN IF HE ONLY HELPS OUT SOMETIMES, THEN HE CAN BE GUILTY OF CONSPIRACY SO LONG AS . . . AND I REPEAT AGAIN; THIS IS VERY IMPORTANT. SO LONG AS HE UNDERSTANDS THAT WHAT'S GOING ON HERE IS THE RUNNING OF THE SHERIFF'S OFFICE NOT JUST WITH ONE BRIBE, BUT WITH A SERIES OF BRIBES, A PATTERN OF RACKETEERING, A SERIES OF BRIBES RELATED TO EACH OTHER OVER A PERIOD OF TIME, FOR THE PURPOSE OF GIVING . . . IN RETURN, RATHER, FOR ACCEPTING BRIBES IN CONSIDERATION FOR DOING FAVORS AND BENEFITS FOR THIS PARTICULAR PRISONER.

SO THE GOVERNMENT, IN COUNT TWO, WOULD HAVE TO PROVE TO YOU THAT EACH DEFENDANT KNEW THAT THAT'S WHAT WAS GOING ON, THAT THERE WAS THIS RICO ENTERPRISE GOING ON, CONDUCTING A PATTERN OF RACKETEERING ACTIVITIES, SPECIFICALLY BRIBERY, IN THE JAIL

THERE AND THAT EACH OF THEM KNEW AND UNDERSTOOD AND AGREED THAT AT LEAST TWO PREDICATE ACTS WERE GOING TO BE COMMITTED AND THAT, THEREAFTER, EACH OF THEM JOINED IN AND DID SOMETHING TO HELP.

NOW, AGAIN, FOR BELTRAN – I MEAN, FOR MARMOLEJO . . . AND I'M NOT ENDORSING THIS. I'M JUST TELLING YOU. BECAUSE THE EVIDENCE IS THAT HE'S THE MAIN PERSON DIALOGING AND RECEIVING AND SO FORTH, THAT PART WOULD BE ONE FACTOR. IN THE FACTOR OF SALINAS, OF COURSE, HIS ROLE IS LESSER. SO WHAT YOU HAVE TO ASK YOURSELF THERE IS, WAS, IN [p. 1769] FACT, THIS PATTERN GOING ON AT ALL. IF YOU'VE ALREADY DECIDED IN COUNT ONE THAT THERE IS NO SUCH PATTERN GOING ON, WELL, THAT'S THE END OF COUNT ONE, AND IT'S ALSO THE END OF COUNT TWO.

BUT IF YOU HAVE FOUND THAT THIS PATTERN IS GOING ON, YOU WOULD'VE ALREADY GONE THROUGH A WHOLE SERIES OF ACTS FOR MARMOLEJO AND YOU WOULD'VE ONLY GONE THROUGH TWO FOR MR. SALINAS. WHAT YOU'RE BEING ASKED TO DECIDE IN COUNT TWO IS . . . IF SALINAS WAS ONLY INVOLVED IN ONE OR TWO OR EVEN NONE, DID HE, NEVERTHELESS, KNOW ABOUT THIS PATTERN. DID HE KNOW THAT THIS WHOLE PATTERN OF ACTIVITY WAS GOING ON AND DID HE THEN KNOWINGLY AND WILLFULLY JOIN IN AND PARTICIPATE AND CONTRIBUTE IN SOME FASHION.

NOW, PARTICULARLY HERE, THE EVIDENCE IS . . . AND THIS IS EVIDENCE THAT YOU CAN TAKE OR LEAVE. I'M NOT ENDORSING IT. BUT THE EVIDENCE IS THAT ON SOME OCCASIONS . . . THAT WERE FRANKLY NOT SPECIFIED, AS TO WHICH ONES. BUT ACCORDING TO THE GOVERNMENT WITNESSES, THAT ON TWO OR THREE OCCASIONS, THAT SALINAS WOULD, IN EFFECT, TAKE OVER. THAT HE WOULD NOT RECEIVE THE MONEY, BUT THAT HE WOULD BE SORT OF THE DEPUTY, WHICH IS WHAT HE WAS, AND THAT THE INSTRUCTIONS WERE, "IF I'M NOT IN AND YOU WANT THESE SERVICES, CALL DEPUTY SALINAS AND HE'LL TAKE CARE OF IT FOR YOU". SO THE GOVERNMENT POINTS TO THAT AS EVIDENCE THAT HE KNOWINGLY AND WILLFULLY PARTICIPATED IN THIS SCHEME EVEN THOUGH HE HIMSELF WAS NOT RECEIVING [p. 1770] BENEFITS THAT MUCH AND EVEN THOUGH HE HIMSELF WAS OBVIOUSLY NOT, AS BETWEEN THE TWO, THE PRIMARY ACTOR.

SO WHAT YOU HAVE TO DECIDE IS WHETHER THAT'S TRUE. WHETHER, NUMBER ONE . . . IN FACT, WHETHER THERE WAS THIS PATTERN OF RACKETEERING GOING ON IN THE JAIL, AND THEN IF SO, DID HE . . . WERE BOTH OF THEM INVOLVED, IN OTHER WORDS, DID BOTH OF THEM UNDERSTAND THE SCOPE OF IT, AND THEN DID SALINAS DELIBERATELY AND WILLFULLY AND KNOWINGLY, WITH CRIMINAL INTENT, JOIN IN TO HELP SHERIFF MARMOLEJO DO THIS ON SEVERAL OCCASIONS, AT LEAST TWO, TWO OR MORE OCCASIONS, DID HE DO

SOMETHING TO JOIN IN AND HELP OUT TO COMMIT THIS OFFENSE.

NOW, AGAIN I HAVE TO TELL YOU THE SAME THING I TOLD YOU UNDER AIDING AND ABETTING. YOU MUST FIND THAT HE KNEW THE CRIMINAL ACTIVITY WAS GOING ON AND THAT HE HAD A CRIMINAL INTENT. IT'S NOT ENOUGH TO FIND THAT HE SIMPLY WORKS THERE AND IT'S NOT ENOUGH TO FIND THAT HE ASSOCIATES WITH THE SHERIFF, BECAUSE, OF COURSE, HE DOES. I MEAN, HE'S THE DEPUTY THERE. AND IT'S NOT ENOUGH TO FIND THAT HE MAYBE WAS JUST CARRYING OUT FUNCTIONS IN THE JAIL. YOU HAVE TO FIND . . . IN ORDER TO FIND HIM LIABLE FOR A CONSPIRACY, YOU HAVE TO FIND THAT HE KNEW WHAT WAS GOING ON, THAT HE KNEW THE EXTENT OF THE CRIMINAL ACTIVITY GOING ON . . . ASSUMING THAT YOU FIND THAT IT WAS GOING ON, THAT HE KNEW THAT, IN FACT, A RACKETEERING ACTIVITY WAS GOING ON AND THAT HE DELIBERATELY JOINED IN ON THE CONSPIRACY. THAT'S IT. I HOPE YOU UNDER-[p.1771]STAND IT.

SOME FINAL COMMENTS. YOU WILL SEE "KNOWINGLY" THROUGHOUT THE INDICTMENT AND "KNOWINGLY" SIMPLY MEANS THE DEFENDANTS KNOW WHAT THEY'RE DOING. THEY KNOW WHAT THEY'RE DOING AND THEY'RE ACTING FREELY AND VOLUNTARILY. THEY HAVE ALL THE FACTS AND IT'S NOT AN ACCIDENT AND IT'S NOT A MISTAKE. "INTENTIONALLY" MEANS THAT THEY ARE ACTING WITH CRIMINAL INTENT. YOU'LL SEE THE WORD ALL THE TIME, "INTENTIONALLY, AND

THAT MEANS THEY KNEW THAT THEY WERE VIOLATING THE LAW. THEY KNEW THAT THEY WERE DOING SOMETHING THAT THE LAW FORBIDS.

NOW, THERE ARE DIFFERENT CRIMES IN HERE. YOU SEE . . . I HOPE YOU UNDERSTAND NOW THAT THEY ARE ALL CONNECTED, THEY ALL HAVE THAT SORT OF SAME FOUNDATION, BUT THEY ARE DIFFERENT. SHERIFF MARMOLEJO IS IN EVERY COUNT AND MR. SALINAS IS ONLY IN COUNTS ONE, TWO, RICO AND CONSPIRACY TO COMMIT RICO, AND HE'S IN THREE AND FOUR, THE TWO . . . WHAT I CALL THE FEDERAL BRIBERY STATUTES UNDER 666. HE'S NOT IN THE THREE MONEY-LAUNDERING COUNTS AND HE'S NOT IN THE TRAVEL ACT. SO YOU MUST REMEMBER, AS YOU GO THROUGH HERE, THAT WE HAVE SEPARATE DEFENDANTS AND WE HAVE SEPARATE COUNTS AND SO YOU HAVE TO VOTE ON EACH COUNT AND YOU HAVE TO VOTE ON EACH DEFENDANT.

NOW, REMEMBER AGAIN THAT THAT'S WHAT YOU'RE HERE TO ANSWER. YOU'RE HERE TO ANSWER, ARE THEY GUILTY OR

• • •

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
LAREDO DIVISION

UNITED STATES OF AMERICA PLAINTIFF, VS. BRIGIDO MARMOLEJO, JR., MARIO SALINAS, ELOY ZAVALA, AND EDELMIRO FLORES, DEFENDANTS.	•	CRIMINAL NO. M-94-010-02

SPECIAL VERDICT FORM AS TO MARIO SALINAS

(Filed Jul. 27, 1994)

As to Defendant Mario Salinas:

COUNT ONE

We, the Jury, find the defendant, MARIO SALINAS, of Count One: ~~GUILTY~~/NOT GUILTY.

RACKETEERING ACT #5: Of committing Racketeering Act #5, we, the Jury, find the defendant, MARIO SALINAS, GUILTY/~~NOT GUILTY~~.

RACKETEERING ACT #12: Of committing Racketeering Act #12, we, the Jury, find the defendant, MARIO SALINAS, ~~GUILTY~~/NOT GUILTY.

COUNT TWO

We, the Jury, find the defendant, MARIO SALINAS, of Count Two: GUILTY/~~NOT GUILTY~~.

COUNT THREE

We, the Jury, find the defendant, MARIO SALINAS, of Count Three: GUILTY/~~NOT GUILTY~~.

COUNT FOUR

We, the Jury, find the defendant, MARIO SALINAS, of Count Four: GUILTY/~~NOT GUILTY~~.

DATE: 7/27/94

/s/ Illegible
FOREMAN

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
McALLEN DIVISION

UNITED STATES OF AMERICA Plaintiff, VS. MARIO SALINAS Defendant.	§ § § § § § §	CRIMINAL NO. M-94-010

MEMORANDUM AND ORDER

(Filed Aug. 8, 1994)

This Defendant has filed a post-verdict motion for acquittal incorporating allegations made in pretrial motions and adding new challenges to the verdict.

The facts underlying this prosecution involved a series of bribes paid primarily to Sheriff Brigido Marmolejo by a federal inmate of the Hidalgo County Jail in return for contact visits and other special privileges. Defendant Salinas was prosecuted under conspiracy and aiding-and-abetting theories. The bribes came from Homero Heraldo Beltran-Aguirre, a convicted federal felon who, during the events in question, was in the custody of the Hidalgo County Jail pursuant to a contract between the federal government and the Hidalgo County Sheriff's Department under 18 U.S.C. §4002. The contract provided that Hidalgo County would house and feed federal felons for a certain amount of money each day. The Hidalgo County Sheriff's Department received over

$800,000 annually from this contract to house federal prisoners in the County Jail.

Counts Three and Four

Salinas argues that 18 U.S.C. §666 is inapplicable because the Sheriff's Department was not receiving "federal assistance" under the contract in question. The pertinent language of §666 is:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists –
>
> (1) being an agent of an organization, or of a State, local or indian tribal government, or agency thereof –
>
> • • •
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, any thing of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> shall be fined under this title, imprisoned not more than 10 years, or both.
>
> (b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, *benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.* (emphasis added)

> (c) This section *does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid and reimbursed, in the usual course of business.* (emphasis added).

Defendant contends that the Hidalgo County Sheriff's Office did not receive federal assistance because the monies received from the government were in exchange for services rendered. Because the federal government received something in return for the money paid, Defendant says it did not confer a "benefit" under the statute. In both *United States v. Stewart,*[1] and *United States v. Webb,*[2] the court stated in dicta that if the government receives a tangible material return – that is, a *quid pro quo* – for funds paid to an entity, that entity has not received a "benefit" under the statute. In *Stewart*, the Defendants – an employee of Bell Helicopter and a third party stole parts from Bell. *Stewart* at 1069. The Government prosecuted under §666, arguing that because Bell Helicopter sold custom-made goods to the government, it received a "benefit under a Federal program involving a contract". *Id.* The court concluded that the statute did not apply because "Congress did not intend the statute to apply in a situation of *quid pro quo.*" *Id.* at 1072.

In *Webb*, the U.S. Department of Housing and Urban Development contracted with a private accounting firm to manage and administer a program which provided rental and utility payment assistance to low and moderate income families. *Webb* at 1169. Several members of the firm, including the defendant, falsified firm records

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[1] 727 F.Supp. 1068, 1072 (N.D.Tex. 1989).

[2] 691 F.Supp. 1164, 1169 (N.D.Ill. 1988).

and embezzled government funds. *Id.* The court dismissed the indictment, stating that government funds paid the firm to manage and administer the program did not constitute benefits under §666. *Id.*

The Second Circuit has recently discredited the *quid pro quo* test as dicta and as an overly broad method for determining the meaning of "benefit" under §666(b). *United States v. Rooney,* 986 F.2d 31 (2nd Cir. 1993). In that case, the court held that a Farmers Home Administration Loan was a "benefit" under the express language and the legislative history of the statute. *Id.* at 34. This Court agrees with *Rooney* that a rigid *quid pro quo* test is not the best approach for interpreting §666(b) and concludes that under both the text of §666(b) and its legislative history, the agreement to house federal prisoners under 18 U.S.C. §4002 was a "benefit[ ] . . . under a Federal program involving a . . . contract." 18 U.S.C. §666(b).

Black's Law Dictionary defines "benefit", *inter alia*, as an "advantage". Black's Law Dictionary (5th Ed. 1979). The contract in question brought the Sheriff's Department an "advantage" in the form of substantial payments of money. *See Rooney* at 34. It is logical to assume that Sheriff Marmolejo would not have voluntarily signed the contract with the federal government if it did not provide a benefit to the Hidalgo County Sheriff's Department.

Moreover, the structure of §666(b) expressly equates a contract with "benefits". As the court stated in *Rooney,* "Federal programs 'involving a grant, contract, subsidy, loan, guarantee, [or] insurance' are a subset of 'form[s] of Federal assistance', which therefore demonstrates that

Congress considered a loan a benefit, even if [the Defendant] does not." *Rooney* at 34. Under this reasoning, a contract is also a "benefit" under the statute. There was also a direct connection between the contract and the bribes in this case, since the bribes were paid by a federal prisoner. But for the contract with the Hidalgo County Sheriff's Department, this prisoner would not have been in the county jail. The United States government has a critical interest in the integrity of a contract to house its prisoners in a local jail.

The Court also notes that the proper inquiry under the statute is not *solely* whether the government provided "federal assistance" but whether the entity received "benefits . . . under a Federal program involving a . . . contract . . . or other form of Federal assistance." 31 U.S.C. §666(b). In support of his argument that the term "assistance" does not include contracts, Defendant cites a separate statute, 31 U.S.C. §6101(3)(B), which states, "assistance . . . does not include . . . [the] procurement of property or services for the direct benefit or use of the government." Yet the Civil Rights Act, which prohibits discrimination under any federally assisted programs, 42 U.S.C. §2000d, specifically includes contracts within its definition of financial assistance. *See* 42 U.S.C. §2000d-1. Therefore, there is no universal statutory definition of the term "assistance".

No Fifth Circuit precedent speaks directly to what *type* of nexus must exist between the federal government and the entity receiving the federal funds to support a §666 conviction. However, the precedent in this and other circuits has consistently emphasized the broad application of §666. *United States v. Snyder,* 930 F.2d 1090 (5th Cir.

1991); *United States v. Moeller*, 987 F.2d 1134, 1137 (5th Cir. 1993); *United States v. Westmoreland*, 841 F.2d 572, 578 (5th Cir.) *cert. denied*, 488 U.S. 820, 109 S.Ct. 62 (1988) ("It is sufficient that Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them."); *United States v. Cicco*, 938 F.2d 441, 445 (3rd Cir. 1991) (purpose of §666 was to "enlarge and clarify" the class of persons subject to federal bribery laws); *United States v. Simas*, 937 F.2d 459, 463 (9th Cir. 1991) (purpose is to protect the integrity of the entities that receive the federal funds).

The legislative history of §666 broadly defines "federal assistance." The statute was "designed to create new offenses to augment the ability of the United States to vindicate significant acts of theft, fraud, and bribery involving Federal monies . . . and section (b) should be "construed broadly, consistent with the purpose of this section to protect the integrity of the vast sums of money distributed through Federal programs . . . . " S. Rep. No. 225 at 369, 98th Cong., 2d Sess., reprinted in 1984 U.S.Code Cong. & Admin. News 3182, 3511.

The Eighth Circuit has also broadly defined "federal assistance". *United States v. Peery*, 977 F.2d 1230, 1232-33 (8th Cir. 1992). In *Peery*, the Defendant, the Executive Director of the Interstate Radioactive Waste Compact Commission, (IRWCC) a five-state entity in charge of disposal facilities for low-level radioactive wastes generated within the member states, stole funds from the IRWCC. *Id.* at 1231-32. The IRWCC received funds throug' the Department of Energy from a surcharge on various local disposal facilities. *Id.* at 1231. The defendant argued that the IRWCC did not receive benefits from the

federal government because the federal government never actually owned the money it distributed. *Id.* at 1232. The court concluded that the receipt of surcharges was a receipt of benefits because it was done pursuant to a specific statutory scheme designed to promote policy objectives relating to the growing national problem of radioactive waste disposal. *Id.* at 1233.

The Second Circuit in *Rooney* stated that, "The inquiry is not whether there is a *quid pro quo*, but, rather, whether the funds disbursed can be considered Federal assistance within a specific statutory scheme intended to promote public policy objectives and not payment by the government as a commercial entity." *Rooney* at 35. That standard informs the resolution of the pending motion. The contract to house prisoners in the Hidalgo County Jail was made pursuant to a specific statutory scheme which promotes public policy objectives. 18 U.S.C. §4002; *see Peery* at 1233. The statutory purpose is to provide "suitable quarters for the safekeeping, care, and subsistence" of all persons held under federal statutes. 18 U.S.C. §4002. The considerable sums of federal money paid to the Sheriff's Office are not payments in a commercial transaction but rather represent funding for an important governmental function, *i.e.*, providing for the care and custody of federal prisoners. The Court concludes that receipt of bribes from a federal prisoner being housed under this program can support a prosecution under §666.

Defendant Salinas next asserts that the contract to house Beltran was exempt under subsection (c), which states that §666 does not apply to "bona fide salary, wages, fees, or other compensation paid, or expenses

paid and reimbursed, in the usual course of business." Although the text and legislative history of subsection (c) provide little assistance in determining its meaning, courts which have faced this issue have expressly or implicitly concluded that subsection (c) does not apply to the federal funds coming into the entity but rather to funds stolen, embezzled, or otherwise converted from the entity to a third party. *United States v. Stout*, 1994 WL 90025 (E.D. Pa); *United States v. Harloff*, 815 F. Supp. 618 (W.D.N.Y. 1993); *United States v. Urlacher*, 979 F.2d 935 (2d Cir. 1992); *United States v. Shelton*, 816 F. Supp. 1132, 1137 (W.D. Tex. 1993); *United States v. Grubb*, 11 F.3d 426, 434 (4th Cir. 1993). Giving a contrary interpretation would nullify the ability of the federal government to vindicate certain acts of theft, fraud, and bribery and exclude from purview of the statute almost all organizations. *Stout at 3.*

Defendant Salinas also claims that the Sheriff's Department is not a "political subdivision" under Texas law because the elected office of Sheriff "is unique in Texas." Under §666(d)(3), the term "local" means "of or pertaining to a political Subdivision within a State." "Pertain" is defined by Black's Law Dictionary, (Fifth Ed.) as "to belong or relate to, whether by nature, appointment, or custom." Under Texas law, counties are political subdivisions of the state, *Com'rs Ct. of El Paso v. El Paso Cty. Sheriff's*, 620 S.W.2d 900, 901 (Tex.Civ.App. – El Paso 1981, writ ref'd n.r.e.) (citing cases), and the County Sheriff's Office clearly relates to the county. Tex. Const. art. V, §2. That office thus pertains to a political subdivision under §666.

Defendant further contends that §666 is inapplicable because this case did not involve the granting of contracts, accepting of bids, theft of property, granting of leases, "or anything of that nature." Without explaining why, Defendant Salinas apparently reads the statute to apply only to business transactions. In fact, the wording and punctuation of the statute makes it applicable to any business or transaction or series of transactions. The Court is satisfied that the instant case involved a series of transactions, albeit not of the ordinary commercial variety.

Count Two

Defendant Salinas claims that the alleged RICO enterprise, i.e. the Hidalgo County Sheriff's Office, is "one and the same" as the incumbent sheriff himself. The Court disagrees. It is beyond dispute that a governmental agency or entity can constitute a RICO "enterprise." *See, United States v. Angelilli*, 660 F.2d 23, 30-33 (2d Cir. 1981); *United States v. Long*, 651 F.2d 239, 241 (4th Cir. 1981); *United States v. Stratton*, 649 F.2d 1066, 1074 (5th Cir. 1981). The Sheriff's Office is an entity that employs hundreds of people. It has existed for generations and presumably will exist well into the indefinite future. That office is clearly distinct from the various individuals who have been and will be elected sheriff throughout the years.

Defendant also attacks the jury instructions pertinent to Count Two. The Court acknowledges some uncertainty about the state of the law in the Fifth Circuit on this

issue[3] but is convinced that its instructions correctly stated the law of conspiracy. A RICO conspiracy does not require the commission of any overt act but only an agreement to violate the law. *United States v. Coia*, 719 F.2d 1120, 1223-24 (11th Cir. 1983), *cert. denied*, 466 U.S. 973 (1984). The Court instructed the jury that the Government must prove the Defendant was aware of the existence of a racketeering enterprise in that he knew the Sheriff's Office was being operated through a pattern of racketeering acts, specifically a series of bribes – at least more than two – over the course of time described in the indictment. The Government was then required to prove that, knowing these facts, the Defendant knowingly and willfully reached an agreement with the Sheriff to participate in this venture. The basic law of conspiracy should be the same for all crimes. The courts historically have been concerned that a defendant should not be found guilty of a RICO conspiracy simply because he agrees to commit one or even several isolated criminal acts. *United States v. Neapolitan*, 791 F.2d 489, 498-499 (7th Cir. 1986), *cert. denied*, 479 U.S. 1101 (1987). The Court fully addressed this concern in its instructions. There is no logical reason, however, why the Government should be required to prove that the defendant conspired to violate two or more specific, identifiable predicate acts listed in the substantive count. In the instant case, there was ample evidence to support a finding that this Defendant knew that Sheriff Marmolejo was repeatedly granting unusual contact and conjugal visits to a federal prisoner

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[3] *United States v. Faulkner*, 17 F.3d 745, 773-774 (5th Cir. 1994).

over a period of time in return for tangible benefits received from that prisoner. The evidence also indicated that Sheriff Marmolejo instructed the prisoner and his agent that Salinas was a trusted lieutenant who should be contacted for favors whenever the Sheriff were unavailable. The evidence further showed that Salinas in fact handled the visitation arrangements on several occasions, albeit not specifically identified by date. There was also evidence that Salinas accepted from the prisoner two valuable watches for himself and distributed four others to jail personnel. The Court is convinced that this and other evidence supports a finding that Defendant Salinas was a knowing and willful member of a RICO conspiracy.

Defendant Salinas makes miscellaneous other complaints including that the prisoner was not in custody pursuant to a court order, that the predicate acts under RICO were only misdemeanors not felonies under state law, and that a deputy sheriff is not a "public servant" under state in law. With respect to the RADO watches, Defendant protests that they were discovered pursuant to a overbroad search warrant and that, because the watches were allegedly forfeited prior to trial (which the Government disputes), double jeopardy prevented apparently even the mention of the watches as part of the evidence in the trial. These allegations were all addressed by the Court prior to trial and have no merit.

The motion for judgment of acquittal is DENIED.

DONE at Laredo, Texas, this 8th day of August, 1994.

/s/ George P. Kagen
United States District Judge

TRUE COPY I CERTIFY ATTEST:

Michael N. Milby, Clerk

By /s/ B. Garcia
Deputy Clerk

UNITED STATES DISTRICT COURT
Southern District of Texas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE** (For Offenses Committed On or After November 1, 1987)
v.	
MARIO SALINAS	Case Number: 7:94CR00010-002
	(Filed Nov. 30, 1994)
	FRANCISCO J. ENRIQUEZ Defendant's Attorney

THE DEFENDANT:

[ ] pleaded guilty to count(s) _____

[ ] pleaded nolo contendere to count(s) _____ which (was)(were) accepted by the court.

[X] was found guilty on count(s) 2, 3 and 4 on 07/27/94 after a plea of not guilty.

Title & Section	Nature of Offense
18 USC § 1962(d)	RICO Conspiracy
18 USC § 666(a)(1)(B) and 18 USC § 2	Bribery in relation to a program receiving more than $10,000 in federal funds.
18 U.S.C. § 666(a)(1)(B) and 18 U.S.C. § 2	Bribery in relation to a program receiving more than $10,000 in federal funds.

Date Offense Concluded	Count Numbers
01/19/94	2
01/18/94	3
01/18/94	4

The defendant is sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[X] The defendant has been found not guilty on count(s) 1

[ ] Count(s) _____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.: 464-96-9122

Defendant's Date of Birth: 01/19/56

Defendant's USM No.: 64880-079

Defendant's Mailing Address:
Rt 4 box 74, Santa Fe St.
Edinburg, Texas

NOVEMBER 23, 199[illegible]
Date of Imposition of Judgment

/s/ George P. Kazen
Signature of Judicial Officer

HONORABLE GEORGE P. KAZEN
UNITED STATES DISTRICT JUDGE
Name & Title of Judicial Officer

Defendant's Residence Address:
Rt 4 box 74, Santa Fe St.
Edinburg, Texas

11/29/94
Date

APPROVED:JECJEC/
SUSPO/rm

DEFENDANT: MARIO SALINAS
CASE NUMBER: 7:94CR00010-002

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 36 months on counts 2, 3 and 4 to be served concurrently.

The defendant was advised of his right to appeal the sentence, including the right to appeal in forma pauperis upon proper documentation.

[ ] The court makes the following recommendations to the Bureau of Prisons:

[ ] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States marshal for this district.
[ ] at ____ a.m./p.m. on _____.
[ ] as notified by the United States Marshal.

[X] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons.

[ ] before 2 p.m. on _____.
[X] as notified by the United States Marshal.
[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on counts 2, 3 and 4 all to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

While on supervised release, the defendant shall not commit another federal, state, or local crime.
While on supervised release, the defendant shall not illegally possess a controlled substance.
While on supervised release, the defendant shall not possess a firearm or destructive device.

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Financial Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the following additional conditions:

The defendant shall adhere to the Court-ordered schedule for the payment of a fine or restitution, if any.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) the defendant shall notify the probation officer within 72 hours of any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any narcotic or other controlled substance, or any paraphernalia related to such substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the

probation officer to make such notifications and to confirm the defendant's compliance with such notification requirements.

FINANCIAL PENALTIES

The defendant shall pay the following total financial penalties in accordance with the schedule of payments set out below.

Count	Assessment	Fine	Restitution
2	$50.00	$5,000.00	
3	$50.00	$5,000.00	(concurrent)
4	$50.00	$5,000.00	(concurrent)
Totals:	$150.00	$5,000.00	

FINE

The fine includes any costs of incarceration and/or supervision.

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the below payment options are subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

  [ ] The interest requirement is waived.
  [ ] The interest requirement is modified as follows:

RESTITUTION

Restitution has not been ordered in this case.

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

The total fine and other monetary penalties shall be due as follows:

[ ] in full immediately.
[ ] in full not later than _____.
[ ] in _____ installments of $_____ over a period of _____ months to commence 30 days after the date of this judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration.
[X] in installments to commence 30 days after the date of judgment. If this judgment imposes a period of incarceration, payment shall be due during the period of incarceration. During a period of probation or supervised release supervision, payment of any unpaid balance shall be a condition of supervision and the U.S. probation officer shall establish and may periodically modify the payment schedule, provided that the entire financial penalty is paid no later than the termination of supervision but in no event later than 5 years after release from incarceration.

[ ] The defendant shall pay the costs of prosecution.
[ ] The defendant shall forfeit the defendant's interest in the following property to the United States.

All financial penalty payments are to be made to the Clerk of Court, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program.

STATEMENT OF REASONS

[X] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 19

Criminal History Category: I

Imprisonment Range: 30 to 37 months

Supervised Release Range: 2 to 3 years

Fine Range: $ 6,000 to $ 302,000

[X] Fine waived or below the guideline range because of inability to pay.

Restitution: $ N/A

[ ] Full restitution is not ordered for the following reason(s):

[X] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

OR

[ ] The sentence departs from the guideline range

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following reason(s):

SUPREME COURT OF THE UNITED STATES

OFFICE OF THE CLERK

WASHINGTON, D.C. 20543

February 24, 1997

Mr. Francisco J. Enriquez
Enriquez & Cantu
4200-B North Bicentennial
McAllen, TX 78504

Re: Mario Salinas
v. United States
No. 96-738

Dear Mr. Enriquez:

The Court today entered the following order in the above entitled case:

The petition for a writ of certiorari is granted. limited to Questions 2 and 3 presented by the petition.

Sincerely,

William K. Suter, Clerk

Supreme Court, U.S.
FILED
APR 7 1997
CLERK

(4)

No. 96-738

In The

Supreme Court of the United States

October Term, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR PETITIONER

FRANCISCO J. ENRIQUEZ*
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QUESTIONS PRESENTED

I. The case against Salinas does not meet the prerequisites for a federal prosecution under 18 USC §666 the Federal Bribery Statute because no Federal funds were in any manner impinged upon. The case involved bribery from a prisoner in return for contact visits. It had nothing whatsoever to do with the disbursement of or impingement upon Federal, or even state or local, funds. The question presented here is:

What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute 18 USC §666? Do such cases include cases where no federal funds are disbursed or impinged?

II. Counts 1 and 2 of the indictment cover RICO substantive and RICO conspiracy respectively. The RICO substantive statute requires that the government prove two predicate acts before a defendant can be found guilty. Salinas was found not guilty of Count 1 (RICO substantive). Salinas contends that before he could be found guilty of RICO conspiracy the government must have proven that Salinas personally committed or agreed to commit two RICO predicate acts. The trial court did not charge the jury in this manner and, in fact, required no acts on Salinas' part. The question presented here is:

Before a defendant can be found guilty of the Conspiracy provisions of the RICO statute, must the government prove that he personally committed or agreed to commit two RICO predicate acts?

LIST OF PARTIES

Petitioner:

MARIO SALINAS
Francisco J. Enriquez
Rolando Cantu
Enriquez & Cantu, L.L.P.
4200-B N. Bicentennial
McAllen, Texas 78504

Respondent:

UNITED STATES OF AMERICA
C/O SOLICITOR GENERAL
Department of Justice
Washington, D.C. 20530

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REFERENCE TO THE OPINIONS OF THE COURTS BELOW

The Court of Appeals Opinion can be found at 89 F.3d 1185 (5th Cir. 1996) and is reproduced in the Appendix to the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Fifth Circuit rendered its opinion on July 17, 1996. Petitioner filed a Motion for Rehearing and Suggestion for Rehearing en Banc. The Rehearing was denied on August 15, 1996. Petitioner timely filed his petition for writ of certiorari on November 12, 1996. The petition was granted on February 24, 1997. This Court has jurisdiction pursuant to 28 USC §1254 (1).

STATUTORY PROVISIONS INVOLVED

18 USC §666

18 USC §1961

18 USC §1962

18 USC §4002

They are reproduced in the Appendix to Petition for Writ of Certiorari.

STATEMENT OF THE CASE

(A) Course of proceeding and disposition in the trial court.

On January 18, 1994, the Petitioner Mario Salinas (hereinafter "defendant" or "Salinas"), was indicted in an eight count indictment only four of which applied to him, charging that he had engaged in a pattern of racketeering activity by accepting bribes in return for contact visits. On July 18, 1994, Salinas was tried by a jury before the Honorable George P. Kazen in the Southern District of Texas, Laredo Division. The jury found Salinas guilty of Counts Two, Three and Four, and not guilty of Count One. Count Two is RICO Conspiracy, 18 USC §1961 et seq. Counts Three and Four are based on 18 USC §666 (Federal Bribery). Judgment was entered November 30, 1994 and a timely Notice of Appeal was filed. Bond pending appeal was granted.

(B) Statement of Facts

On or about June 1991 Homero Beltran, a Federal prisoner, was placed in the Hidalgo County Jail, Hidalgo County, Texas, by the U.S. Marshall's office. He remained there until approximately March or April of 1992 at which time he was moved to other institutions eventually being placed in a Federal penitentiary. During this first stay he pled guilty in January 1992 to a number of Federal drug violations. On or about November of 1992 Beltran was returned again at the Marshall's direction to the Hidalgo County Jail. He was kept there pending a case concerning an associate of his against whom he was

suppose to have testified. His stay this time ended in April 1993.

He has claimed that during this time he and his brother-in-law Juan Antonio Guardado paid numerous bribes to Brigido Marmolejo, Sheriff of Hidalgo County in return for the Sheriff arranging and allowing contact and conjugal visits. According to Beltran most of these visits took place in the Sheriff's personal office.

Mario Salinas at all times important to this prosecution was a deputy sheriff and held the title of a Chief Deputy. He was assigned the duties of managing the jail in Hidalgo County, its employees and prisoners. There was no evidence that he *granted* any contact visits. The testimony was that on one or two occasions the Sheriff instructed Salinas to supervise a contact visit when he could not be present.

The hierarchy of the Sheriff's Department showed the Sheriff as the head, with Deputy Bob Davis immediately below the Sheriff. Reporting to Bob Davis and the Sheriff, the next level was the "Chief Deputies". Below the Chief Deputies were Captains and Lieutenants, and so forth.

The testimony showed that the persons entitled to grant contact visits were the Sheriff, Bob Davis, the chiefs, the captains and in some instances the lieutenants. Contact visits are visits where the prisoner actually has physical contact with the visitor.

Defendant Salinas was indicted for allegedly participating in this bribe scheme in return for contact visits for the prisoner Homero Beltran. The original indictment

included allegations of bribery involving another prisoner, but those charges were dismissed by the Government upon resting its case.

SUMMARY OF THE ARGUMENT

The Government attempted to literally make a federal case out of a state case. The mechanisms it has used for this purpose are the RICO statute and 18 USC §666, the Federal Bribery statute. For ease of reference throughout this brief 18 USC §1961 et seq. will be referred to as "RICO".

As to 18 USC §666 the Government has not met its burden to show that this is the kind of case contemplated by the Federal Bribery Statute. No funds, Federal or state or county, were disbursed, adversely affected, or unduly influenced by the alleged bribery. In order to make this action by a deputy sheriff in the State of Texas a Federal violation the statute has numerous jurisdictional elements and requirements, some of which have not been met in this case. For example, before a state entity can be held to fall within the purview of the statute, it must receive Federal funds as part of a Federal program. No Federal funds were impinged upon.

As to RICO, Salinas was found not guilty in Count One the substantive RICO count. The Court improperly charged the conspiracy RICO Count Two by failing to require that the jury find that Salinas personally committed or agreed to commit two RICO predicate acts. There was no evidence that he *granted* any contact visits. The testimony was that on one or two occasions the Sheriff

instructed Salinas to supervise a contact visit when he could not be present.

The state law violation the Government has chosen in order to create a Federal RICO case is the Texas Bribery Statute. For a number of reasons, Defendant Salinas feels that the Government has not proven its RICO case and that this was not a RICO case in the first place. For example, RICO requires that the state law be a felony violation. The evidence in this case shows that it was a misdemeanor violation. This and other requirements have not been met and Salinas should have been acquitted on all RICO counts.

Because of the facts of this case, or lack thereof, this case should not have been brought against Salinas.

ARGUMENT AND AUTHORITIES

I. The Fifth Circuit's Opinion Directly Conflicts With The Second Circuit Decision In *Foley* And The Third Circuit Decision In *Cicco* Which Indicate That The Type Of Actions Prosecuted In Salinas Do Not Fall Under The Federal Bribery Statute.

IMPROPER PROSECUTION FOR FAILURE TO UNDULY INFLUENCE FEDERAL PROGRAM FUNDS. It is clear from the legislative history and case law that this case is not within the proscription of 18 USC §666. The Government complains of the alleged contact visits given, supposedly in return for consideration received by the defendants. The statute makes it an offense for someone to corruptly solicit or demand, or accept, or agree to accept, anything of value from any person with intent to

be influenced or rewarded in connection with any "business, transaction, or series of transactions . . . involving value of $5,000.00 or more." 18 USC §666 (a) (1) (B).

However, this case does not involve any granting of contracts in return for kickbacks, accepting of bids, embezzling of government money, theft of government property, granting of leases in return for payoffs, or anything of that nature. Therefore, there is no "business, transaction, or series of transactions . . . involving value of $5,000.00 or more". The statute simply does not apply. No federal funds were disbursed or impinged upon as is required by the law.

In the case of *United States v. Cicco*, 938 F.2d 441 (3rd Cir. 1991), the defendants were charged under §666 for alleged corrupt solicitation of political services and loyalty in exchange for municipal jobs.

> The government argues that it has proven each element of a §666 violation. Under the government's theory, the defendants corruptly solicited political services and loyalty from municipal employees and did so intending to be influenced in the distribution of municipal jobs. Guttenberg annually receives more than $10,000.00 in federal funds and the jobs were worth more than $5,000.00 per-year.

Id. at 444. The court reviewed in depth the legislative history of the statute and the case law interpreting it. The court held, "It is thus apparent that the crimes Congress targeted when it created §666 are simply different in kind than those alleged in the case at bar." *Id.* at 445. In *Cicco*, the Court of Appeals and District Court noted, and the Government agreed, that §666 requires the solicitation to

be in connection with a "transaction of a local government or organization. . . . " *Id.* at 444. The court found that the conduct upon which the indictment was based was simply not a "transaction of a local government" and that §666 was ambiguous. *Id.* at 444. The following cases are examples where the *character* of a proscribed §666 transaction was more appropriately illustrated.

In *United States v. Crozier*, 987 F.2d 893 (2nd Cir. 1993) there was a $30,000.00 payment to a county executive instrumental in helping Crozier obtain a contract with the county to provide architectural services. The court also stated, "Section 666 (c) was enacted to punish corrupt payments made to state or private officials who disburse federal funds." *Id.* at 898. (There was no proof that Sheriff Marmolejo or Deputy Salinas were officials who disbursed Federal funds).

In *United States v. Westmoreland*, 841 F.2d 572 (5th Cir. 1988), a county supervisor appealed her conviction for bribery because she took kickbacks in transactions involving the purchase of county materials. "Evidence of the sales transactions associated with the alleged bribes shows that Westmoreland authorized, and the county paid, a total of $14,482.92 for the purchased goods." *Id.* at 575.

In *United States v. Moeller*, 987 F.2d 1134 (5th Cir. 1993), officials for the former Texas Federal Inspection Service were indicted for improperly awarding consulting contracts. Here there was bribery *involving* Federal money as the court indicated was spoken to by the legislative history. *Id.* at 1136.

In the case presently before this court the Government has not alleged and cannot show any transactions of the nature proscribed by the statute.

The congressional intent was to design tthe statute in a manner to protect Federal monies distriibuted. "The Senate Report specifically states that the new statute, §666, was intended to . . . 'protect the integritty of the vast sums of money distributed through federral programs from . . . undue influence by bribery.' . . . The emphasis was on protecting federal funds." *United Sitates v. Wyncoop*, 11 F.3d 119, 122 (9th Cir. 1993). In Salinas no Federal funds were in any manner impinged upon, nor was any proof submitted on this issue. There is no Federal crime here. As stated in *United States v. Foley*, 73 F.3d 484, 493 (2d Cir. 1996), if the act has "affected neither the financial interests of the protected organization nor ffederal funds directly" there is no violation.

> [W]e have held that there was no viollation of that section where the preservation off federal funds was not implicated by defendamt's conduct; and we have expressed doubt as to whether §666 (a) (1) (B) would be applicable where the conduct at issue affects neiither the federal program funds received by a protected organization nor the receiving organiization's financial interests.

United States v. Foley, 73 F.3d 484, 492 (2d Cir. 1996).

Some Courts have confused this impingement issue with a tracing of funds issue. They have held that Federal funds to the entity that receives them do not have to be traced directly for there to be a violation of 18 USC §666. Their rationale is that Federal funds and local funds are

easily commingled and the Federal character is lost. *United States v. Simas*, 937 F.2d 459, 463 (9th Cir. 1991) This analysis is in conflict with the legislative history of the statute.

> As indicated, this part of title IX covers both theft and bribery type offenses. *With respect to theft*, 18 USC 665 makes *theft or embezzlement* by an officer or employee of an agency receiving assistance under the Job Training Partnership Act a Federal offense. However, there is no statute of general applicability *in this area*; and *thefts* from other organizations or governments receiving Federal financial assistance can be prosecuted under the general theft of Federal property statute, 18 USC 641, only if it can be shown that the property stolen is property of the United States. In many cases, such prosecution is impossible because title has passed to the recipient before the property is stolen, *or the funds are so commingled that the Federal character of the funds cannot be shown.*

1984 USCCAN 3510 (emphasis added).

> *With respect to bribery*, 18 USC 201 generally punishes corrupt payments to Federal public officials, but *there is some doubt* as to whether or under what circumstances *persons not employed by the Federal Government* may be considered as a "public official" under the definition in 18 USC 201 (a) as anyone 'acting for or on behalf of the United States, or any department, agency or branch of Government thereof. . . . '

1984 USCCAN 3510 (emphasis added).

Obviously, the Congressional intent concerning the commingling of funds related to the prosecution of theft

or embezzlement, not bribery. The bribery issue Congress addressed through the passage of §666 was *who* could be prosecuted. Consequently, those cases are wrong that state that in the bribery context, the Government need not show a tracing of Federal assistance funds. Salinas was indicted under the bribery portion of the statute, not the theft or embezzlement provisions.

Regardless of the tracing issue, the legislative history enlightens us as to what was the Congressional intent and the purpose of then new §666.

> The Committee intends that the term 'Federal program involving a grant, a contract, a subsidy, a loan, a guarantee, insurance, or another form of Federal assistance' be construed broadly, consistent with the *purpose* of this section *to protect the integrity of the vast sums of money* distributed through Federal programs *from* theft, fraud, and *undue influence by bribery*.

1984 USCCAN 3511. It, therefore, becomes clear that for the statute to apply some Federal monies must have been unduly influenced by the bribery. This is wholly lacking in the Salinas prosecution.

The Salinas case is even further removed from this jurisdictional element. Here, not only were Federal funds not impinged upon, not even local funds were put in jeopardy. This prosecution is an impermissible stretch of Federal jurisdiction.

The decision of the Fifth Circuit below conflicts directly with these principles and with cases in other circuits.

The focus of the statute here is not on the regulation of state affairs, but, rather the protection of federal funds. This much is certain. However, if a fair reading of the statute shows it to be unclear as to whether the purpose is to regulate particular state affairs or officials, then the "clear statement rule" would come into play and, still, prevent the application of the statute to Salinas under the facts of the case.

> We will not read the ADEA to cover state judges unless Congress has made it clear that judges are included.
>
> . . . .
>
> Rather, it must be plain to anyone reading the Act that it covers judges. In the context of a statute that plainly excludes most important state public officials, 'appointee on the policymaking level' is sufficiently broad that we cannot conclude that the statute plainly covers appointed state judges. Therefore, it does not.

Gregory v. Ashcroft, 501 U.S. 452, 467, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

Here there is no clear statement *as is required* from Congress in order to allow the application of a federal criminal statute to state officials. *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (mail fraud – state officials – intangible rights to honest and impartial government).

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as

> limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than this.

483 U.S. at 360. Likewise, §666 is directed to a protection of property, specifically government property. To read it broader than that would result in a direct confrontation of the issue of whether the Federal government can preempt State rights to govern the conduct of and punish its own officials. It is undisputed that concerning criminal law *in general* the States have primacy. "We have also spoken of comity and federalism. 'The States possess primary authority for defining and enforcing the criminal law. . . . ' " *Brecht v. Abrahamson*, 507 U.S. 619, 635, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). "The Justice Department itself recognizes that a broad interpretation of the . . . provisions would violate 'the principle that the primary responsibility for enforcing state laws rests with the state concerned.' " *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 503, 105 S.Ct. 3292, 87 L.Ed.2d 346 (1985) (Marshall dissent).

> Under the Government's theory of prosecution, §666 would become a federal anti-bribery statute. Every state falls within the $10,000.00 federal funding jurisdiction element, and thus, every state employee would fall within the jurisdiction of the statute. [FN7] There remains, of course, the $5,000.00 transaction requirement, but according to the Government, any such transaction would be covered by §666, even if there were no connection at all to federal funds.
>
> This reading of §666 is certainly not implausible. However, it would drastically change the

> balance of power between federal and state governments by bringing conduct that had previously been entirely in the realm of the states within the federal purview. Yet, 'unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance.' Bass, 404 U.S. at 349, 92 S.Ct. at 523.
>
> . . . .
>
> FN7. At oral argument, the United States agreed that its construction of the statute would enable it to prosecute, for example, 'a secretary for a state parking agency receiv[ing] federal funds.' (Transcript of June 4, 1996 hearing, at 16:9-10).

United States v. Frega, 933 F.Supp. 1536, 1540 (S.D.California 1996).

"The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990). It is basic black letter law that "[O]ur Constitution establishes a system of dual sovereignty between the States and the Federal Government." *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (federal statute interfering with qualifications of State judicial officers).

> 'In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision.'
>
> . . . .
>
> This plain statement rule is nothing more than an acknowledgment that the States retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere.

Gregory v. Ashcroft, 501 U.S. 452, 461, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991).

The statute does not appear to be an exercise of Congress' Commerce Clause power, nor does it seek to justify itself as such. *See*, for example, 18 USC §1962 (c) (RICO requires enterprise engage in or affect interstate commerce). It contains no jurisdictional element that would ensure, through case by case inquiry, that the proscribed conduct affects interstate commerce. Its absence is a marker which indicates that it is not defensible as a Congressional exercise under the commerce clause. *United States v. Lopez*, 115 S.Ct. 1624, 1631, 131 L.Ed.2d 626 (1995).

> We pause to consider the implications of the Government's arguments. The Government admits, under its 'costs of crime' reasoning, that Congress could regulate not only all violent crime, but all activities that might lead to violent crime, regardless of how tenuously they relate to interstate commerce. See Tr. Of Oral Arg. 8-9.

> Similarly, under the Government's 'national productivity' reasoning, Congress could regulate any activity that it found was related to the economic productivity of individual citizens: family law (including marriage, divorce, and child custody), for example. Under the theories that the Government presents in support of §922 (q), it is difficult to perceive any limitation on federal power, even in areas such as criminal law enforcement or education where States historically have been sovereign. Thus, if we were to accept the Government's arguments, we are hard-pressed to posit any activity by an individual that Congress is without power to regulate.

Id. at 1632.

Especially in an area such as the Salinas case, where Federal and State relations are sought to be balanced by the question of the applicability of a Federal criminal statute to state officials, this Court should hold that §666 does not apply unless Federal funds are impinged upon, i.e., unduly influenced.

CONGRESSIONALLY TARGETED FEDERAL FUNDS WERE NOT UNDULY INFLUENCED. Assuming the alleged bribe can be found to somehow unduly influence Federal funds, the legislative history and a plain reading of the statute indicate that not all Federal funds received by a local agency give rise to the statute's jurisdiction. Before an individual can be found liable under §666, the Government is required to prove that the organization the individual worked for received "federal assistance." "The circumstances referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess

of $10,000 under a Federal *program* involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal *assistance*." 18 USC §666 (b) (emphasis added).

This was alleged by the Government in both Counts Three and Four of the indictment. The "federal assistance" was alleged to have been received between June 1, 1991, and June 1, 1992, in Count Three. The "federal assistance" was also alleged to have been received between September 1, 1992, and September 1, 1993.

The Government has sought to base the applicability of §666 on an alleged contract for services between the Hidalgo County Sheriff's Office and the United States Marshall's Service. It relied on a contract between the Sheriff's Office for the housing of Federal Prisoners and the periodic payments made thereunder. *Government's Response to Defendant's Motion to Dismiss 18 USC Section 666 Counts In Indictment*, paragraph II. See also Joint Appendix page 41.

Both factually and legally the Government has failed to meet this burden. No Federal program and no Federal assistance is involved. Consequently, no protected Federal funds could have been unduly influenced.

This contract is made pursuant to 18 USC §4002 entitled "Federal Prisoners in State Institutions; Employment." However, the Supreme Court of the United States has firmly established the nature of the relationship created by such contracts. *Logue v. United States*, 412 U.S. 521 (1973).

> Though petitioners do not always distinguish between their two theories, they appear to contend alternatively that the Nueces County jail is a "Federal agency" by reason of its contract for the care of federal prisoners, or that the employees of the jail are "acting on behalf of" the Bureau of Prisons or the Government in performing services for federal prisoners. The Court of Appeals rejected these contentions, and we believe that it was right in doing so.

Id. at 526. The role of the Sheriff's Office in this case was defined as that of an independent contractor.

> Thus, Congress not only authorized the Government to make contracts such as the one here in question, but rather clearly contemplated that the day-to-day operations of the contractor's facilities were to be in the hands of the contractor, with the Government's role limited to the payment of sufficiently high rates to induce the contractor to do a good job.

Id. at 529. As stated in the case, "We agree with its relevant holding that the Sheriff's employees were employees of a 'contractor. . . . ' " *Id.* at 530.

Interest is due on late payments under the contract, a further indication of the commercial nature of the contract.

> The Prompt Payment Act, Public Law 97-177 (96 Stat. 85, 31 USC 1801) is applicable to payments under this agreement and requires the payment to the County of interest on overdue payments. Determinations of interest due will be made in accordance with provisions of the Prompt Payment Act and the Office of Management and budget Circular A-25.

Joint Appendix page 50. The Prompt Payment Act §1801 has now been recodified in 31 USC §§3902 and 3903. "[T]he head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required date, shall pay an interest penalty to the concern on the amount of the payment due." 31 USC §3902 (a). The Government's attempt to characterize a *1984 partial payment* under a prior contract for *construction* of the jail as meeting the §666 jurisdictional requisite is a recognition that 1991, 1992, and 1993 payments under the Intergovernmental Service Agreement do not qualify as Federal assistance payments under §666. It is simply the Government stretching jurisdiction beyond the limits of the statute.

Obviously, there is no federal assistance here. Rather, the money it pays under the contract to house prisoners in the Hidalgo County Jail are merely funds received in return for services rendered. This issue has also been foreclosed against the Government by the legislative history of §666.

> The term "federal program" means that there must exist a specific statutory scheme authorizing the federal assistance in order to promote or achieve certain policy objectives. Thus, not every federal contract or disbursement of funds would be covered. For example, if a government agency lawfully purchases more than $10,000.00 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000.00 or more from the supplier a federal crime.

1984 USCCAN page 3511. Likewise, in a detailed discussion of this very issue, Courts have already determined the parameters of §666.

> The Court notes that the statute was amended and the amendment became effective in 1986. Subsection (c) of the statute was changed to read as follows:
>
> > (c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses reimbursed, in the usual course of business.
>
> The amendment reinforces the interpretation that the section was not meant to apply to commercial transactions.

United States v. Stewart, 727 F.Supp. 1068, 1072 (N.D. Tex. 1989). The Government has exceeded the limits of the statute. *Id.* at 1072.

This interpretation is also supported by Federal statutes. The statute dealing with the General Assistance Administration defines the parameters of federal "assistance." 31 USC §6101 (3) (B) indicates that assistance "does not include . . . procurement of property or services for the direct benefit or use of the Government." See also, 18 USC §666 (c) which makes §666 inapplicable to fees, compensation paid, or expenses paid or reimbursed, in the usual course of business.

At trial, the Government's witness on these matters was Phyllis Diane Motes, the administrative officer for the U.S. Marshall's Office responsible for insuring the payment of various local jails for housing the Federal prisoners. Transcript Volume IV, page 1135. She testified

unequivocally that the payments made were contract payments for services rendered and that they were not grant money, Federal assistance or anything of that nature.

BY MR. ENRIQUEZ:

Q. Ms. Motes, would you agree that these payments that you've testified about are contract payments for services rendered?

A. Yes, sir.

Q. They're not grant money or federal assistance or anything of that nature?

A. No, sir.

Transcript Volume IV, pages 1138 and 1139. The Government has, therefore, failed to meet this necessary element.

In summary, the contract funds the Government rely on do not give rise to a Federal Crime under §666. No Federal program funds were unduly influenced as is required.

CONGRESSIONALLY TARGETED FEDERAL FUNDS WERE NOT RECEIVED. In order for Federal program funds to have been unduly influenced, it would logically seem that the local agency must have first received such funds. *See, United States v. Frega*, 933 F.Supp. 1536, 1542 (S.D.California 1996). Indeed, the statute so requires.

> The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000.00 under a Federal program involving a grant, contract,

> subsidy, loan, guarantee, insurance, or other form of Federal assistance.

18 USC §666 (b). "Taking the words of the statute at face value it is apparent that for purposes of the conduct proscribed by section 666 (a) (1) the defendant *must* be an agent of the agency receiving federal benefits in excess of $10,000." *United States v. Moeller*, 987 F.2d 1134, 1137 (5th Cir. 1993) (emphasis added). The indictment, in fact, stated, "At all times material to this indictment the Hidalgo County Sheriff's Office . . . received federal assistance. . . . " Joint Appendix pages 96 and 97.

In this regard, the applicable portion of §666 targets state employees who are agents of a local government. 18 USC §666 (a) (1). The term "local" is defined in the statute to mean of or pertaining to a political subdivision. Likewise government agency is defined in terms of a political subdivision. 18 USC §666 (d). This was alleged in the indictment and is a jurisdictional prerequisite to prosecution under §666.

The elected office of sheriff is unique in Texas and does not meet the jurisdictional requirements of §666. Sheriffs have no one above them except the voters, and the deputies serve at the sheriff's discretion. *Irby v. Sullivan*, 737 F.2d 1418 (5th Cir. 1984). Deputies such as Salinas are not even considered the type of public officials who have any protected proprietary right in their employment. *Id.* Deputies serve at the pleasure of the sheriff. Texas Local Government Code §85.003. The Sheriff's Office, a constitutionally created elected office, is not an agency created by the state or county. *Tex. Const. Art. V, sec. 23.* Nor are deputies subject to county authorities,

such as the Commissioners Court. Actions by the County attempting to exercise such authority are subject to being enjoined. *Commissioners Court of Shelby County v. Ross*, 809 S.W.2d 754, 757 (Tex. App. – Tyler 1991, no writ). The case of *City of El Paso v. El Paso Community College*, 729 S.W.2d 296, 299 (Tex. 1986) establishes the criteria for a political subdivision. Since the Office of the Sheriff of Hidalgo County, at a minimum, does not have the power to assess and collect taxes it does not meet that criteria. *Id. at 299.* See also *State v. Garcia*, 800 S.W.2d 872, 879 (Tex. App. – San Antonio 1990, petition for discretionary review refused) (sheriff's department is not a political subdivision). In any event, the Government did not present any proof of these issues.

From this discussion, two things become obvious. First, the Office of the Sheriff of Hidalgo County, Texas is not a political subdivision and does not, therefore, meet the requirements of §666. Second, the contract the government relies on is with the County of Hidalgo and not with the Office of the Sheriff of Hidalgo County. Consequently, the jurisdictional prerequisite that an employee of the organization that receives the money be one who committed the crime, is lacking.

> The purpose of this Intergovernmental Service Agreement (IGA) is to establish a formal binding relationship between the U.S. Marshals Service and other federal user agencies (the government) and Hidalgo County, Texas (*The County*) for the detention of persons charged with or convicted of violations of federal law or

> held as material witnesses (federal prisoners) at the Hidalgo County Jail (the facility).

Joint Appendix pages 45 and 46 (emphasis added).

"Our statutory analysis begins with the principle that because §666 is punitive, it must be strictly construed. . . . Therefore, the language and legislative history of §666 must be scrutinized to determine if . . . conduct comes within the statute's prohibitions." *United States v. Barquin*, 799 F.2d 619, 621 (9th Cir. 1986) (defining "political subdivision"). In this case that jurisdictional requisite to state employee criminal responsibility is not met. No federal funds were impinged upon.

666 CONCLUSION

No Federal funds were disbursed or impinged upon as a result of the alleged bribery. As such, Federal funds were not "unduly influenced." Indeed no funds of any governmental agency, Federal, State or local, were influenced at all.

Even if this Court were to find that Federal funds were somehow impinged upon, it is not all Federal funds that are protected by the scope of §666. Only Federal Assistance funds from a Federal program are congressionally targeted under the statute. Here the Government can only rely on a contract for services received. No Federal assistance funds were unduly influenced.

Finally, no Federal funds were impinged upon, since the Office of the Sheriff of Hidalgo County, Texas is not a political subdivision as is required by the statute. The

Federal funds received are not for the Office of the Sheriff, but are for the County, a separate entity.

To prosecute Salinas in the Federal judicial system violates the plain meaning of the statute and legislative history. Under the facts of this case Salinas is not within the scope of §666.

If this Court determines that it is not clear whether Salinas is within the scope of the statute, the clear statement rule would advise that as a matter of federalism he be found not to be included within its scope.

Because of the numerous issues raised by the Government's attempt to make a state case into a federal case and because of the numerous hurdles built into this statute before it can be properly framed as a federal case, the rule of lenity would apply and require a dismissal. *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130, 133 (5th Cir. 1992). Where there is doubt as to whether a conviction is predicated on an impermissible ground the conviction should be vacated. See *Stromberg v. Caiifornia*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

II. The Fifth Circuit's Opinion On The Issue Of RICO Conspiracy Elements Is Directly In Conflict With The First Circuit Decision In *Carrozza*, The Second Circuit Decision In *Ruggiero* and The Tenth Circuit Decision In *Sanders*.

Salinas objected to the Court's instructions to the jury on the RICO conspiracy issue in Count Two of the verdict. The jury found him not guilty of Count One which

was the RICO substantive count. Joint Appendix page 143. The jury found no pattern of racketeering activity as to Salinas.

Yet, the Court's instructions to the jury allowed a finding of guilt to conspiracy without the necessity of the jury finding that this defendant either actually committed two or more of the alleged racketeering acts or that he agreed personally to perform two or more of the specific acts. "A valid RICO conspiracy conviction requires proof that the defendants conspired to engage in a pattern of racketeering activity. Proof of a pattern of racketeering activity requires proof of at least two predicate acts, each of which must be a criminal offense." *United States v. Marcello*, 876 F.2d 1147, 1152 and 1153 (5th Cir. 1989). The defendant, to be found guilty of RICO conspiracy, must have committed or have agreed to commit at least two separate crimes in furtherance of the conspiracy. *United States v. Phillips*, 664 F.2d 971, 1039 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136, 102 S.Ct. 2965 (1982).

> In summary, unless there occurred two separate acts which Echezarreta agreed to do in furtherance of the conspiracy to import marijuana, there was no pattern of racketeering necessary for conviction for participation in a RICO conspiracy. There were no two separate acts.

Id. "The gravamen of the conspiracy charge . . . is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes." *United States v. Elliot*, 571 F.2d 880, 902 (5th Cir. 1978).

In one of the earliest RICO cases decided by the Supreme Court the issue of what proof was required in

order to establish a pattern of racketeering was addressed. The case involved a defendant who was convicted under the RICO conspiracy provision. The Court stated that a pattern of racketeering activity is a series of criminal acts and that it "is proved by evidence of the requisite number of acts of racketeering committed *by the participants in the enterprise.*" *United States v. Turkette*, 452 U.S. 576, 583, 101 S.Ct. 2524, 69 L.Ed.2d 246 (1981). (issue: whether both legitimate and illegitimate enterprises are encompassed in RICO) (emphasis added). That is, the participants, to be held liable under RICO are required to do the predicate acts.

As noted in the case of *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) a racketeering activity must be an act in itself subject to criminal sanction. 473 U.S. at 488. The case involved the application of civil RICO to non-organized crime defendants. There were two substantive RICO counts and one conspiracy RICO count. 473 U.S. at 484.

In *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) the Court established the operation or management test for liability under RICO. 507 U.S. at 179. In other words for someone to be subject to RICO's severe civil and criminal penalties he must participate in some directional activities. This requirement permeates the entire statute, not just the substantive provisions. It permeates the Organized Crime Control Act of 1970 of which RICO is a part.

> 'The danger that commission of such offenses by other individuals would subject them to proceedings under title IX [RICO] is even smaller than any such danger under title III of the 1968 [Safe Streets] [A]ct, since commission of a crime listed under title IX provides only one element of title IX's prohibitions. Unless an individual *not only commits such a crime* but engages in a pattern of such violations, and uses that pattern to obtain or operate an interest in an interstate business, *he is not made subject to proceedings under title IX.*' 116 Cong.Rec., at 18940.

507 U.S. at 183.

In construing RICO concepts including conspiracy concepts the Court has stated,

> [W]e may take guidance from a provision elsewhere in the Organized Crime Control Act of 1970 (OCCA), Pub.L. 91-452, 84 Stat. 922, of which RICO formed Title IX. OCCA included as Title X the Dangerous Special Offender Sentencing Act, 18 USC Section 3575 et seq. (now partially repealed). Title X provided for enhanced sentences where, among other things, the defendant had committed a prior felony as part of a pattern of criminal conduct *or in furtherance of a conspiracy to engage in a pattern of criminal conduct.*

H.J. Inc. v. Northwestern Bell Telephone Company, 492 U.S. 229, 240, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) (emphasis added). See also, *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985) (useful in interpreting other sections of RICO). As applied to conspiracy as it relates to the pattern requirement, a person is a special offender if he has committed a felony and

> . . . such felony was, or the defendant committed such felony in furtherance of, a conspiracy with

> three or more other persons to engage in a pattern of conduct criminal under applicable laws of any jurisdiction, and the *defendant did, or agreed that he would*, initiate, organize, plan, finance, direct, manage, or supervise all or part of such conspiracy or conduct, or give or receive a bribe or use force as all or part of such conduct.

18 USC §3575 (e) (3) (repealed) (emphasis added). The statute requires the conspirator to personally do or agree to do certain specific acts, precisely what numerous courts below have required in a RICO conspiracy context.

Even the Government in the past has agreed that a RICO §1962 (d) conspiracy requires proof that a defendant agreed to personally commit two or more predicate crimes. *United States v. Winter*, 663 F.2d 1120, 1136 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S.Ct. 1249, 75 L.Ed.2d 479 (1983).

The conspiracy case against Defendant Salinas was tried under these theories.

The Court: I thought you told me that . . . And I haven't had a chance to look at it. But I thought you told me that it did apply to . . . I thought you told me that even a RICO conspiracy has to be a conspiracy to do certain RICO acts?

Mr. Surovic: Yes, Sir.

Mr. Canales: Yes.

Mr. Surovic: Each conspirator has to agree to perform –

Mr. Canales: Two.

Mr. Surovic: – at least two racketeering acts.

Mr. Canales: And that's his proposed charge.

Transcript Volume V pages 1230 and 1231.

Mr. Surovic: Your honor, my understanding of the racketeering conspiracy caselaw is that cases have been overturned when it was unclear from the record which particular racketeering acts, especially if they were less than . . . you know, less than two racketeering acts, were identified with each individual. Each individual has to be identified with at least two specific racketeering acts.

Transcript Volume V page 1273.

The Court: I thought that you were all telling me that it has to be a conspiracy precisely to do one of those acts?

Mr. Surovic: Well, yes, your honor. The jury has to determine that they were involved in the conspiracy for purposes of each . . . I mean they have to find specific predicates acts that he was conspiring.

Transcript Volume V page 1290. Mr. Surovic, making these representations to the court, was the AUSA who tried the cause on behalf of the Government.

Defendant Salinas was indicted under this theory. "It was further part of the conspiracy that each defendant agreed that two or more of the acts of racketeering activity, as specified in paragraph 7 of Count One, which are realleged and incorporated by reference herein, would be committed in the conduct of the affairs of the enterprise." Indictment page 36, paragraph 5. Joint Appendix page 89.

Despite it having been the law of the Fifth Circuit and despite it being the law of the case, the Court instructed the jury that Defendant Salinas could be found guilty of RICO conspiracy even if he was not involved in any predicate acts.

> What you are being asked to decide in Count Two is . . . If Salinas was only involved in one or two or even none, did he, nevertheless, know about this pattern. Did he know that this whole pattern of activity was going on and did he then knowingly and willfully join in and participate and contribute in some fashion.

Transcript Volume VI page 1769. Joint Appendix page 139. This was error.

Apparently it was the intent of the trial court to either test the Fifth Circuit's prior rulings on this matter or to bring about a change in the law to conform to what it believed to be the law of some other circuits.

> The Court: And there's this problem that there's some old Fifth Circuit cases that arguably mean something else.
>
> Now, the Eleventh Circuit, supposedly has now said that the fifth circuit probably never meant that and wouldn't mean it today. That case you all gave me a month ago says, 'well, we don't need to reach that', but I'm just saying that even if I get reversed on it, at least we'll get the law cleared up.

Transcript Volume VI page 1590. Joint Appendix page 113.

Certainly, other circuits' opinions in instances do not require the two predicate acts for the RICO conspiracy. But those cases do not elucidate a clear standard and it is very likely that even under their standard the Salinas conspiracy count would still have been instructed in the manner suggested by Salinas. For example, the Eleventh Circuit case which discusses this issue in depth and with extended analysis is *United States v. Carter*, 721 F.2d 1514 (11th Cir. 1984). Yet, the holding in that case mandates the submission requested by Salinas.

> In summary, we hold that where the government's evidence establishes that a defendant agreed to participate in a conspiracy with a single objective, the requisite pattern of racketeering necessary to the objective of a RICO conspiracy is lacking. Only by demonstrating that the defendant agreed to personally commit two or more predicate acts is this lack cured. In a case of this type, the trial court must instruct the jury that an essential element of a RICO conspiracy charge is an agreement to participate in the enterprises's affairs by personally committing, or agreeing to personally commit, two or more predicate acts.

Id. at 1531. Eventually, the Salinas case was submitted on one prisoner, involving one bribe scheme – that is, a single objective. The trial court recognized this when it stated, "I mean, granted, it's one arrangement. . . . " Transcript Volume V page 1243. In actually instructing the jury, he further stated, "[I]f, in fact, they happened, then, as you know . . . I mean, the allegation is that they were all coming from the same source, they were all for the same purpose, they were all fairly related in time. . . . " Transcript Volume VI pages 1759 and 1760. Even the prisoner and his brother-in-law Guardado considered it to be one arrangement, although the prisoner was in the Hidalgo County Jail at two different time periods.

Q. Did you have a discussion with Mr. Marmolejo?

A. Yes, we had a conversation.

Q. What did you talk about?

A. Well, about Homero's coming back to Edinburg and if the same deal could continue like before and he said, yes, and we went ahead and continued with it.

Q. Did you discuss the details of the deal before?

A. They were the same. We did not have to discuss it. We already knew about it.

Transcript Volume II page 520. See also Transcript Volume I pages 218, 234 and 243. There is really no question that the facts in Salinas give rise to a single objective case. In *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989) there were multiple bribes over a six year period of time with the

objective of influencing utility rates. It was analyzed by the Supreme Court under the theory that such conduct involved a single objective with multiple predicate acts. 492 U.S. at 237.

Since Salinas is a single objective case, even under an Eleventh Circuit analysis the RICO conspiracy count should have been submitted in a manner which required the jury to find that Salinas had performed or agreed to personally perform two or more predicate acts.

The trial court's Memorandum And Order filed August 8, 1995 in addressing this issue and in defending its jury submission on RICO conspiracy relies on the case of *United States v. Coia*, 719 F.2d 1120 (11th Cir. 1983). Joint Appendix page 145. This reliance is misplaced. In that case the court discussed overt acts, not predicate acts. *Id.* at 1124. Also, in reaching its decision it erroneously relied on Second Circuit caselaw. *Id.* at 1124. It is well known that the Second Circuit requires the type of submission requested by Salinas. "All that must be shown is: (1) that defendant agreed to commit the substantive racketeering offense through agreeing to participate in two racketeering acts. . . . " *United States v. Delano*, 825 F.Supp. 534, 542 (W.D.N.Y. 1993).

There is serious doubt whether a single objective scheme even with multiple predicate acts comes within the proscription of RICO. *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 229, 242, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989). Salinas was indicted on three predicate acts only two of which went to the jury. He was found to have committed only one. Two predicate acts without more do not constitute a pattern. *H.J. Inc. v.*

Northwestern Bell Telephone Company, 492 U.S. 229, 242, 109 S.Ct. 2893, 106 L.Ed.2d 195 (1989); *Sedima, S.P.R.I. v. Imrex Company, Inc.*, 473 U.S. 479, 497 n.14, 105 S.Ct. 3275, 87 L.Ed.2d 346 (1985).

The intent of Congress both from a plain reading of the statute and its legislative history is that for someone to come under the proscription of RICO conspiracy he must have committed a predicate act or at the very least agreed to personally commit a predicate act. For example, 18 USC §1962 (d) states, "It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section." The substantive provision which the Salinas conspiracy count refers to states,

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, *to conduct or participate*, directly or indirectly, in the conduct of such enterprises affairs *through a pattern of racketeering activity* or collection of unlawful debt.

18 USC §1962 (c) (emphasis added). As noted above, in *Reves v. Ernst & Young*, 507 U.S. 170, 113 S.Ct. 1163, 122 L.Ed.2d 525 (1993) the Court, in interpreting the "to conduct or participate" requirement, established the operation or management test for liability under RICO. 507 U.S. at 179. In other words for someone to be liable for RICO's severe civil and criminal penalties he must participate in some directional or managerial activities. The RICO conspiracy provision in essence requires that Salinas must have conspired "to conduct or participate . . . through a pattern of racketeering activity. . . . "

As defined in the statute " 'pattern of racketeering activity' requires at least two acts of racketeering activity. . . . " 18 USC §1961 (5). A plain reading dictates the instruction requested by Salinas.

It is disingenuous for the Government to now argue to the contrary when the case was tried under this theory, where proposed Government Instructions were submitted under this theory and where Salinas was indicted under this concept.

> . . . Brigidio Marmolejo, Jr., Mario Salinas, Eloy Zavala, and Edelmiro Flores . . . did combine, conspire, confederate, and agree with each other . . . to violate Title 18, United States Code, Section 1962 (c), *that is, to conduct and participate*, directly and indirectly, in the conduct of the affairs of the enterprise *through a pattern of racketeering activity*.

Joint Appendix page 89 (emphasis added).

Additionally, Salinas was a deputy sheriff deputized by the Sheriff of Hidalgo County, Texas. When the focus of a Federal statute is not on the regulation of state affairs, then there is no clear statement *as is required* from Congress in order to allow the application of a federal criminal statute to state officials. *McNally v. United States*, 483 U.S. 350, 360, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) (mail fraud – state officials – intangible rights to honest and impartial government).

> Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read §1341 as

> limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than this.

483 U.S. at 360.

Under both the majority and the dissent, the focus of the statute was an important consideration. With that kind of analysis, it is clear from the history of RICO that its focus is organized crime and not state officials. Consequently, Salinas' prosecution under this statute is arguably not authorized. "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987). "We begin with the axiom that, under our federal system, the States possess sovereignty concurrent with that of the Federal Government, subject only to limitations imposed by the Supremacy Clause." *Tafflin v. Levitt*, 493 U.S. 455, 458, 110 S.Ct. 792, 107 L.Ed.2d 887 (1990) (it is proper for federal court to abstain on a civil RICO claim pending in state court). *See also, Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991) (federal statute interfering with qualifications of State judicial officers).

Although purporting to use State statutes as predicate acts for RICO, in fact the lower Federal Courts have created their own interpretations of state law and have instead in essence established a federal standard of conduct for state officials, a clear violation of the principles of federalism.

For example, the allegations and facts adduced at trial, if taken as true, at most constitute a Class A Misdemeanor under State Law and therefore cannot be predicate acts under RICO. 18 USC §1961 (1) (A). Only a felony under Texas Law can constitute a predicate act for RICO purposes. *Id*. Texas Penal Code §36.08 (b), a misdemeanor statute, applies to the allegations against this defendant, if taken as true. The pertinent provisions are as follows:

> (b) A public servant in an agency having custody of prisoners commits an offense if he solicits, accepts, or agrees to accept any benefit from a person the public servant knows to be in his custody or the custody of his agency.
>
> . . . .
>
> (g) An offense under this section is a Class A misdemeanor.

Texas Penal Code §36.08 (b) and (g).

This is noted in the practice commentary to the statute. "Like bribery, the offense punishes the public servant who solicits a gift as well as the one who accepts or agrees to accept one. It is narrower than bribery, however, in that it applies only to public servants with specified governmental functions." Practice Commentary following §36.08 of the Texas Penal Code.

The Government contention is that the defendant's actions come within the prohibition of the general bribery statute, Texas Penal Code §36.02, a felony statute. However, since another more specific statute applies (the misdemeanor statute) this brings into play the concept that it is only the specific statute which will be applied. *Tawfik v. State*, 643 S.W.2d 127 (Tex. Ct. Crim. App. 1982) (En banc);

Ex parte Holbrook, 606 S.W.2d 925 (Tex. Ct. Crim. App. 1980) (En banc); *Ex parte Harrell*, 542 S.W.2d 169 (Tex. Ct. Crim. App. 1976).

Punishment under State Law for a Class A Misdemeanor includes a possibility of confinement for a term not to exceed one year. Texas Penal Code §12.21. However, the applicable RICO provisions only prohibit racketeering activities (predicate acts) which are punishable by imprisonment for more than one year. 18 USC §1961 (1) (A).

Therefore, the racketeering acts alleged by the Government cannot constitute predicate acts for the RICO Conspiracy Count Two. That is state law. Yet, the Courts below have chosen to not follow established principles of state law. Rather, the Fifth Circuit relied on Federal Law to interpret this area. "The appropriate inquiry is which statute criminalizes the defendant's conduct here. *See Tunnell*, 667 F.2d at 1185 (concluding that defendants were properly charged under the statute which criminalized their exact behavior)." *United States v. Marmolejo*, 89 F.3d 1185, 1195 (5th Cir. 1996).

As another example, in Count Two of the indictment of which Salinas was convicted, and in all racketeering acts alleged, the Government has claimed that the prisoner in question was "a person then being held in the custody of the Hidalgo County Sheriff's Office by order of the Federal Court. . . . " The actions the Government complains of are alleged to be in violation of Texas Penal Code §36.02 (a). This is one of the Texas Bribery Statutes. Texas Penal Code §36.01 defines "custody" and requires

an order of the Court, hence the Government's allegations in the indictment.

There exists no order of the Court and none was introduced by the Government at trial which orders the prisoner in question to be held in custody in the Hidalgo County Jail. Instead, this Salinas alleges and the Government concedes that the custody in the Hidalgo County Jail is pursuant to agreement between the U. S. Marshall's Service and the County of Hidalgo. Evidence of this was introduced at trial. Joint Appendix page 41.

Therefore, defendant's conduct, again, as alleged does not fall within the prohibition of 36.02 (a) of the Texas Penal Code as claimed by the Government. *Hild v. State*, 94 S.W.2d 733 (Tex. Crim. App. 1936) (Legal Custody must be alleged in the indictment). Yet, the courts below did not follow State law on this issue.

As a further example, and as noted above, Mario Salinas, a deputy sheriff, does not come within the "public servant" provisions of Section 36.02 of the Texas Penal Code, and cannot be found guilty under RICO Conspiracy Count Two. Despite this, the trial court instructed the jury that the office of the Sheriff of Hidalgo County was in essence a political subdivision of the State of Texas.

The Government relied on state law violations for the predicate acts necessary to find guilt under the Federal RICO statute. These so called violations, under these circumstances, cannot be considered predicate acts. The above analysis indicates that if the federal courts below had followed State law construction of the Texas Bribery Statute they would have found no violation of the statute

relied upon by the government. Consequently, Salinas, a deputy in Texas, could not have been prosecuted under RICO, either on the substantive charge or the conspiracy charge. Thus, it is clear that federal courts have established their own federal standard of what actions by the Sheriff's Office violate State law. "[I]t is difficult to think of a greater intrusion on state sovereignty than when a federal court instructs state officials on how to conform their conduct to state laws." *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 106 (1984) (11th Amendment context).

Also implicated when the Federal government seeks to create and impose a standard of conduct on state officials is a potential Commerce Clause conflict. "As against Congress' powers '[t]o regulate Commerce . . . among the several States.' U.S. Const., Art. I, §8, cl. 3, the authority of the people of the States to determine the qualifications of their government officials may be inviolate." *Gregory v. Ashcroft*, 501 U.S. 452, 464, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991). "When Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.' " *United States v. Lopez*, 115 S.Ct 1624, 1631 n.3, 131 L.Ed.2d 626 (1995). How much more so when courts impose a Federal standard of conduct and seek to punish state officials under that conduct.

RICO CONCLUSION

To require before a RICO conspiracy conviction that a defendant committed or personally agreed to commit two specific acts is consistent with the view in both the majority and minority of circuits that in a single objective RICO conspiracy, the court should instruct the jury in the manner requested by Salinas.

Regardless of whether it is a single object conspiracy or a multiple object conspiracy, a plain reading of the RICO statute, the Organized Crime Control Act of 1970, and the legislative history require the elements suggested by Salinas.

Since State Officials are involved this Court should require, at least in this case, that the Salinas requested instruction should have been given. Such a requirement provides some safeguard that a defendant will not be convicted in a situation where it is questionable that the statute even applies. It also provides some measure of specificity to a situation, such as this, where the Constitutional structure of federalism comes into play.

Because of the numerous issues raised by the Government's attempt to make a state case into a federal case and because of the numerous hurdles built into this statute before it can be properly framed as a federal case, the rule of lenity would apply and require a dismissal. *United States v. Hartec Enterprises, Inc.*, 967 F.2d 130, 133 (5th Cir. 1992). Where there is doubt as to whether a conviction is predicated on an impermissible ground the conviction should be vacated. See *Stromberg v. California*, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931).

CONCLUSION

For the reasons set forth above, defendant Mario Salinas' convictions of Counts Two, Three and Four should be reversed, and judgment of acquittal entered. Further in the alternative Salinas' conviction should be reversed and this matter remanded for a new trial. Salinas further prays for general relief.

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF FOR RESPONDENT BRIGIDO MARMOLEJO, JR. IN SUPPORT OF PETITIONER MARIO SALINAS

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QUESTION PRESENTED

2. The case against Salinas does not meet the prerequisites for a federal prosecution under 18 U.S.C. Section 666 the Federal Bribery Statute because no federal funds were in any manner impinged upon. The case involved bribery from a prisoner in return for contact visits. It has nothing whatsoever to do with the disbursement of or impingement upon federal, or even state or local funds. The question presented here is:

What kind of cases involving state employees are subject to prosecution under the Federal Bribery Statute 18 U.S.C. Section 666? Do such cases include cases where no federal funds are disbursed or impinged?

RULE 29.1 STATEMENT

Pursuant to Rule 29.1 of the Rules of this Court, Respondent hereby lists the following as parties to the proceedings:

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RULE 29.1 STATEMENT – Continued

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INTEREST OF RESPONDENT SUPPORTING PETITIONER'S POSITION

Mr. Brigido Marmolejo, Jr. and Petitioner were co-defendants in the courts below. Pursuant to Supreme Court Rule 12.6, Mr. Marmolejo submits this brief on the merits as a Respondent supporting the position of Petitioner. By filing this document Mr. Marmolejo hereby notifies the Court of his interest in the outcome of this case, and qualifies himself for relief from this Court.

SUMMARY OF THE ARGUMENT

In light of legislative history, the rule of lenity, and given the significant incursion by the federal government into the States' primacy over criminal matters and into the affairs of state governance in this case, Marmolejo's and Salinas' convictions must be reversed absent an unambiguous expression of Congressional intent to apply 18 U.S.C. § 666 to the circumstances of this case and a clear threat to a federal interest. Neither exists in this case. Congress expressly limited its jurisdiction under § 666 to situations involving theft, fraud, and bribery involving federal monies.[1] *See* Senate Report No. 225, 98th Cong., 2d Sess. 370 (1984), *reprinted in* 1984 U.S.C.C.A.N.

[1] The jurisdictional restriction is consistent with Spending Clause doctrine regulations of federal expenditures which "might be illegitimate if they are unrelated to the federal interest in particular national projects or programs," or if Congress' desire to regulate is not unambiguously conveyed. *See South Dakota v. Dole*, 488 U.S. 203, 207, 97 L.Ed.2d 171, 178, 107 S.Ct. 2793, 2796 (1987).

3182, 3511 [hereinafter S.Rep. No. 225]. Here, no federal monies were even remotely affected by the bribery conduct.

ARGUMENT

In order to find federal jurisdiction in this case the Fifth Circuit majority opinion grouped a Cooperative Agreement Plan (hereinafter CAP) with Intergovernmental Service Agreement (hereinafter IGA) to form one agreement which it deemed was a "Federal program". *U.S. v. Marmolejo*, 89 F.3d 1185, 1189 n.4 (5th Cir. 1996). It reasoned that this combination constituted a "Federal Program" because the CAP agreement stated that it provided "Federal participation in the funding of local governmental jail construction, renovation or improvement programs". *U.S. v. Marmolejo*, 89 F.3d 1185, 1190-1191 (5th Cir. 1996).[2]

[2] However, Title 18 United States Code § 4002 provides for suitable quarters for the "safekeeping, care and subsistence" of federal prisoners and states no policy objectives. *See also Logue v. U.S.*, 412 U.S. 521, 37 L.Ed.2d 121, 93 S.Ct. 2215 (1973) [County Jail was an independent contractor under 18 U.S.C. § 4002 contract which was governed by Bureau of Prison rules governing, *inter alia*, visitation privileges]. Although, 18 U.S.C. § 666 does not define "federal program", the Senate report accompanying the statute's enactment provides an explicit definition of federal program which excludes payments in exchange for services such as those under the IGA and the CAP.

> "The term 'Federal program' means that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives. Thus, not every Federal

More importantly, the majority held that the provision of conjugal visits to inmate Beltran constituted a thing of value which the federal government intended to regulate under § 666 because such visits were of value to Beltran and were a part of Marmolejo's and Salinas' responsibility to control Beltran's visitation under the federal prison housing "program". *U.S. v. Marmolejo*, 89 F.3d 1185, 1192-1193 (5th Cir. 1996). It valued the conjugal visit at the going market rate of $5,000 to meet the jurisdictional requirement that the "transaction" involve "anything of value of $5,000 or more". *U.S. v. Marmolejo*, 89 F.3d 1185, 1192-1193 (5th Cir. 1996).

1. SECTION 666 REQUIRES THE DEFENDANT BE AN AGENT OF AN ORGANIZATION RECEIVING OVER $10,000 IN BENEFITS UNDER A FEDERAL PROGRAM THUS RAISING A QUESTION WHETHER BRIBERY UNDER SECTION 666 MUST AFFECT THE FEDERAL FISC

Section 666(a)(1)(B) applies to an agent of an organization, who " . . . agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of

> contract or disbursement of funds would be covered. For example, if a government agency lawfully purchase more than $10,000 in equipment from a supplier, it is not the intent of this section to make a theft of $5,000 or more from the supplier a Federal crime. It is, however, the intent to reach thefts and bribery in situations of the types involved in the *De Toro, Hinton,* and *Mosley* cases cited herein." S.Rep. No. 225 at 3510.

transactions of such organization, government, or agency involving anything of value of $5,000 or more. . . . " 18 U.S.C. § 666(a)(1)(B). The organization must receive benefits of over $10,000 under a federal program within a year before its agent can be charged with bribery under § 666(a)(1)(B). Subsection (a) requires that the circumstance described in subsection (b) exists.

> "The circumstance referred to in subsection (a) of this section is that the organization . . . receives, in any one year period, benefits in excess of $10,000 under a Federal Program. . . . " 18 U.S.C. § 666(b).

The split among the circuit courts is patent evidence of the ambiguity. *Compare U.S. v. Marmolejo*, 89 F.3d 1185, 1194 (5th Cir. 1996); *with, U.S. v. Foley*, 73 F.3d 484, 490 (2d Cir. 1996). The requirement that the organization receive benefits under a federal program would not need to be in § 666 at all if this statute were *not* meant to protect the integrity of the federal fisc.

"The starting point in interpreting a statute is its language, for 'if the intent of Congress is clear, that is the end of the matter.' " *Good Samaritan Hosp. v. Shalala*, 124 L.Ed.2d 368, 113 S.Ct. 2151, 2157 (1993) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L.Ed.2d 694, 104 S.Ct. 2778 (1984)); *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 103 L.Ed.2d 290, 109 S.Ct. 1026 (1989); *Howe v. Smith*, 452 U.S. 473, 480, 69 L.Ed.2d 171, 101 S.Ct. 2468 (1980).

Because, the words of § 666(a)(1)(B) can be interpreted to support both the contentions that 1) federal funds must b disbursed or impinged by the bribery; and

2) that federal funds need not be disbursed or impinged by the bribery, it is appropriate to examine the legislative history of § 666.

2. THE LEGISLATIVE HISTORY OF SECTION 666 SHOWS THAT IT WAS INTENDED TO FILL A GAP WHICH CALLED INTO QUESTION THE ABILITY OF THE GOVERNMENT TO PROSECUTE PERSONS FOR BRIBERY WHO WERE NOT FEDERAL OFFICIALS BUT WHO DID ADMINISTER FEDERAL FUNDS

The Senate Report concerning § 666 states that this offense was created to augment the government's ability to "vindicate significant acts of theft, fraud, and *bribery involving Federal monies*. . . . " S.Rep. No. 225 at 3510. And further stated that the purpose of § 666 was "to protect the integrity of the vast sums of money distributed through Federal programs from theft, fraud and undue influence by bribery." S.Rep. No. 225 at 3511. Section 666 was intended simply to fill a gap in the existing statutory scheme, which had left in dispute the federal government's authority to prosecute bribery of persons who were not federal officials but who administered federal funds. The Senate Report explained that § 666 was designed to allow such prosecutions by federal authorities, explicitly recognizing that state and local authorities had not brought such prosecutions under their own laws because they perceived the federal government to be "the principal party aggrieved." S.Rep. No.225 at 3510.

Congress recognized that a conflict then existed among, and within, the federal circuits "on the question whether a person employed by a private organization

receiving Federal monies pursuant to a program is a 'public official' for purposes of section 201." S.Rep. No. 225 at 3510-3511 and n.2-3. Congress recognized that resolving this conflict might not be necessary, because the same "issue [was] due to be decided soon by the Supreme Court," which had granted review in *U.S. v. Hinton*, 683 F.2d 195 (7th Cir. 1982), *aff'd sub nom, Dixson v. U.S.*, 465 U.S. 482, 79 L.Ed.2d 458, 104 S.Ct. 1172 (1984). S.Rep. No. 225 at 3510-3511, n.2. It appears that Congress enacted § 666 because it was not clear how the Court would rule in *Hinton* and because any ruling might be limited to "the context of the particular HUD program in that case." S.Rep. No. 225 at 3510-3511, n.2.

Accordingly, far from expressing an intent to intrude broadly into the domain of state and local government, Congress expressed an intent only to prosecute a narrow category of crimes, which state and local officials themselves considered within the domain of the federal government. The crimes of bribery and theft are not federalized simply because the wrongdoing involves an organization which receives money from the federal government. If Congress had intended to criminalize essentially every instance of bribery of a state or local official, whether or not the bribery affected any program involving federal funds, Congress presumably would have mentioned so dramatic an expansion of the law somewhere in its discussion of § 666.

In practice Courts have applied § 666 in this manner. In *U.S. v. Dransfield*, 104 F.3d 350, 1996 WL 537919 (2d Cir. 1996), contracts for noise abatement were awarded to persons under a bid rigging scheme and Federal Aviation Administration funds paid for the contract work through

the New York School Construction Authority. Although the payments could not be identified as the *direct* receipt of *federal funds* the Court found the conduct was covered by § 666 because the *conduct* involved the city contracting with an independent entity to administer federal funds. *U.S. v. Dransfield*, 104 F.3d 350, 1996 WL 537919 (2d Cir. 1996).

Marmolejo and Salinas did not contract with inmate Beltran to administer federal funds. They took private money in exchange for extending superfluous privileges.

In *U.S. v. Foley*, 73 F.3d 484, 490-91 (2d Cir. 1996), the Second Circuit held that the Government is not "required to trace the agent's corrupt expenditures to the federal program funds; but . . . there was no violation [of 666(a)(1)(B)] where the preservation of federal funds was not implicated by the defendant's conduct".

> "Plainly some briberies of state officials may come within the scope of Sec. 666(a)(1)(B), but we infer from the legislative history that that section was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds." *U.S. v. Foley*, 73 F.3d 484, 494 (2d Cir. 1996).

3. EARLIER LEGISLATION, WHICH PROVIDED THE MODEL FOR § 666, CONFIRMS THAT CONGRESS WAS CONCERNED ONLY WITH BRIBERY INVOLVING FEDERAL FUNDS

The Senate Report on § 666 notes that it was "derived from" S. 1630, a bill introduced in the prior Congress, and, in particular, the comprehensive bribery provision in

section 1751 of that bill. S.Rep. No. 225 at 3510 n.1. The legislative history of section 1751 is therefore instructive as to what Congress did or did not intend to reach in § 666.

The drafters of section 1751 viewed the then existing federal bribery provisions as inadequate because they did not cover all the persons or organizations which should be included or activities which should be illegal. Senate Report No. 97-307, 97th Cong., 1st Sess. 797. Section 1751 therefore included organizations charged by a federal statute with administering federal program monies:

> "an organization charged by a federal statute . . . with administering monies or property derived from a federal program, and the recipient's conduct is related to the administration of such program." Section 1751 (c)(1)(I), S.Rep. No. 97-307, 97th Cong., 1st Sess. 797.

This provision was designed "to protect the integrity of the vast sums of money distributed pursuant to federal programs from undue influence through bribery, by creating federal jurisdiction *when the conduct sought to be affected is related to the administration of the program.*" S.Rep. No. 97-307, 97th Cong., 1st Sess. 803. This Senate Report noted that "unfortunately, although understandably, states and localities are often reluctant to pursue such cases out of a belief that the aggrieved party is primarily the Federal government". S.Rep. No. 97-307, 97th Cong., 1st Sess. 803.

The Senate Report on the bribery provision of § 666 expressly cross-references this discussion of § 1751. In so doing, the Senate Report confirms that in § 666, as in

§ 1751, Congress was concerned with criminalizing bribery of state, local, and private officials where such bribery relates to the administration of "Federal programs". S.Rep. No 225 at 3510 n.1. Congress expressed no interest in prohibiting bribery of such officials in circumstances where the integrity of federal funds is not implicated.

4. THE UNITED STATES' SUGGESTION THAT LEGISLATIVE HISTORY SUPPORTS ITS EXPANSIVE CONSTRUCTION OF § 666 IS MISPLACED

A. CONGRESS' DIRECTIVE THAT "FEDERAL PROGRAM" BE BROADLY CONSTRUED IS IRRELEVANT.

In support of its expansive reading of the bribery provision of § 666, the United States has, in its brief to the Fifth Circuit at page 38, previously invoked the directive in the Senate Report "that the term 'Federal program . . .' be construed broadly." S.Rep. No 225 at 3511. But this definition of "Federal program" does not address whether the act of bribery charged must implicate federal funds. That term addresses which types of federal funding of a state and local or private program may trigger the statute, not whether the statute may be triggered even when no federal funding of any type is affected by the conduct.

In fact, in the same sentence providing for this "broad construction" of "Federal program," Congress confirmed the limited purpose of § 666: "the purpose of this section [is] to protect the integrity of the vast sums of money distributed through federal programs." S.Rep. No. 225 at 3510.

In *U.S. v. Moeller*, 80 F.3d 1053, 1056 (5th Cir. 1996) persons who solicited campaign contributions were rewarded with sham consulting contracts for the Texas Federal Inspection Service. Whether the offense was indeed a federal offense was not raised in *U.S. v. Moeller*, 80 F.3d 1053 (5th Cir. 1996).

B. CONGRESS' CONCERN WITH "COMMINGLING" OF FEDERAL AND NON-FEDERAL FUNDS IS LIKEWISE IRRELEVANT WHERE, AS HERE, THE OFFENSE IS BRIBERY NOT THEFT.

The United States has also relied on the Senate Report's statement that § 666 was designed to reach circumstances in which "the funds are so commingled that the Federal character of the funds cannot be shown." S.Rep. No. 225 at 3510. The Senate Report made this statement with respect to the *theft* provision, 666(a)(1)(a), and not with respect to the bribery provision. The theft provision was expressly designed to fill a separate gap in the law that then existed under 18 U.S.C. § 641. Specifically, Congress intended to criminalize thefts even when "title has passed to the recipient before the property is stolen, or the funds are so commingled that the Federal character of the funds cannot be shown." S.Rep. No. 225 at 3510. Congress specifically designed § 666's theft provision to parallel 18 U.S.C. § 665, which prohibits agents of federal job training programs from stealing "moneys funds, assets, or property which are the subject of a [federal] financial assistance agreement or contract." S.Rep. No 225 at 3510. Congress stated that the theft provision of § 666 was to serve as "statute of general

applicability in this area," S.Rep. No. 225 at 3510, thereby implying that this provision was to apply only where the defendant's actions, like those under § 665, affected the disposition of federal funds. In other words, in the theft provision of § 666 as well as in the bribery provision, Congress was concerned only with reaching misconduct *involving federal funds*.

Consistent with this legislative history, in *U.S. v. Valentine*, 63 F.3d 459, 464 (6th Cir. 1995) the Court, not surprisingly, found that misappropriated funds need not be traced to federal program funds.

The same was found by the Ninth Circuit in *U.S. v. Wincoop*, 11 F.3d 119, 121 (9th Cir. 1993), by the Second Circuit in *U.S. v. Coyne*, 4 F.3d 100 (2d Cir. 1993), and in the Fifth Circuit in *U.S. v. Westmoreland*, 841 F.2d 572, 576-77 (5th Cir.), *cert. denied*, 488 U.S. 820, 109 S.Ct. 62, 102 L.Ed.2d 39 (1988) [in this context "it is clear that Congress has cast a broad net to encompass local officials who may administer federal funds, regardless of whether they actually do"].

5. FURTHER, THE AMBIGUITY REGARDING WHETHER BRIBERY UNDER § 666 MUST IMPINGE ON FEDERAL FUNDS MUST BE RESOLVED IN FAVOR OF LENITY

The rule of lenity dictates that Marmolejo's and Salinas' convictions be set aside. If there are any doubts in interpreting an ambiguous statute, they are resolved in the defendants' favor. *U.S. v. Enmons*, 410 U.S. 396, 411, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973). "This being a criminal statute, it must be strictly construed, and any ambiguity

must be resolved in favor of lenity." *U.S. v. Enmons*, 410 U.S. 396, 411, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973). In light of the rule of lenity, and given the significant incursion by the federal government into the states' primacy over criminal matters and into affairs of state governance in this case, Marmolejo's and Salinas' convictions must be reversed absent an unambiguous expression of Congressional intent to apply § 666 to the circumstances of this case and a clear threat to a federal interest.

6. AMERICAN FEDERALISM PRECLUDES APPLICATION OF A FEDERAL STATUTE TO AN AREA HISTORICALLY COVERED BY THE POLICE POWERS OF THE STATES ABSENT CONGRESS' CLEAR STATEMENT TO THE CONTRARY

Thus, it cannot be presumed that Congress intended in § 666 to vastly expand federal criminal jurisdiction to reach virtually all bribery involving state and local officials without any mention in its text, statutory findings, or legislative history. Instead, under *U.S. v. Bass*, 404 U.S. 336 (1971), and its progeny, before courts may construe a federal criminal statute to so fundamentally alter the relationship between federal and state governments, Congress must have clearly stated its intent to do so. Congress has made no such statement here. The Government's reading of § 666 is all the more implausible given the history of federal bribery legislation, which traditionally has applied only to areas of direct federal interest. *See generally Dixson v. U.S.*, 465 U.S. 482, 491-92 (1984). *See also* Section 2 *supra*. If Congress had intended to criminalize essentially every instance of bribery of a state or local official, whether or not the bribery affected

any program involving federal funds, Congress presumably would have mentioned so dramatic an expansion of the law somewhere in its discussion of § 666.

The integrity of the funds expended under the IGA and CAP were not affected in any way by the scheme to pay private funds in exchange for conjugal visits. The payment of $840,000 received by Hidalgo County per year for housing federal prisoners at cost was not diverted or expended in an improper manner because of the exchange of private money by Beltran for superfluous visitation privileges. The conjugal visits were not provided for in the IGA, CAP or 18 U.S.C. § 4001 *et seq.*

The authority for the USMS, a branch of the Department of Justice, to enter into the CAP and IGA is found in 18 U.S.C. §§ 4001-009 & 4041-042. In particular, § 4002 provides:

> "For the purposes of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons." 18 U.S.C. § 4002.[3]

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[3] Section 4002 further provides that the rates to be paid for the care and custody of federal prisoners depends on the character of the quarters, sanitary conditions and quality of subsistence. Section 4006 states that "[t]he Attorney General shall allow and pay only the reasonable and actual cost of the subsistence of prisoners. . . . " With respect to construction, § 4003 authorizes the Attorney General to select sites for

No significant acts of theft, fraud or bribery involving Federal monies occurred. Beltran was provided the same "safekeeping, care and subsistence" which other federal inmates received under the housing agreements at no extra cost to him or expense to the federal government. Beltran made separate arrangements for the superfluous privilege of receiving conjugal visits in a manner which did not affect the federal fisc.

The Fifth Circuit majority would extend federal jurisdiction beyond matters involving or affecting the integrity of the federal fisc to include anything a private person might assign a value of $5,000 or more. Under the Fifth Circuit's analysis, as long as Marmolejo and Salinas were seeing to the needs of federal inmates, in exchange for $5,000 or more, anything they might provide, including "intangibles", would bring their conduct within 18 U.S.C. § 666. Such "intangibles" could conceivably

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building prisons when space is not available, and § 4009 authorizes appropriations "for the purpose of leasing or acquiring a site, preparation of plans and erections of necessary buildings under § 4003."

It is clear from the history of §§ 4001 *et seq.* that Congress was simply trying to find a way to provide adequate federal prison space for housing federal prisoners. Prior to 1895 there were no federal prisons and all federal prisoners were confined to state prisons. *See* Ira P. Robbins, *The Prisoners' Mail Box and the Evolution of Federal Inmate Rights*, 144 F.R.D. 127, 132-35. The statute further authorized the Attorney General to appropriate money for the "leasing or acquiring of a site, preparation of plans, and erection of necessary buildings." May 14, 1930, c. 274, at § 5, 46 Stat. 326.

With minor revisions, the pertinent portions of that act are now codified at 18 U.S.C. §§ 4001 *et seq.*

include cell assignment, top versus bottom bunk sleeping arrangements, extra recreation time, permission to smoke cigarettes, or an extra visit from family members arriving at the jail during non-visitation hours.[4] Neither the text nor the legislative history of § 666 provides any indication, much less the *clear* indication required by *U.S. v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971) and its progeny, that Congress intended to criminalize nearly every act of bribery of state and local government that involves at least $5,000.

Public officials who receive payments above their salaries in exchange for such privileges may be charged under Texas Penal Code § 36.01 with bribery. This is also true in other states. *See, e.g.*, AL ST § 13A-10-60 *et seq.*; AK ST § 11.56.100 *et seq.*; AR ST § 21-8-607; CT ST T.53A, Ch. 952, Pt. XI, Refs & Anos.; MN St § 609.42; NY CIV SERV § 107; WV ST § 61-5-7. "Federalism serves to assign political responsibility," and to hold government accountable to the people. *See U.S. v. Lopez*, 115 S.Ct.1624, 1638, 131 L.Ed.2d 626 (1995) [Kennedy, J., concurring]. Because this is so, the concept of American federalism requires Marmolejo's and Salinas' convictions be set aside.

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[4] "[T]he legislative history of Sec. 666 indicates that the value of a thing for purposes of Sec. 666 (a)(1)(B) is not to be assessed by reference to any and every perspective or measure of value, no matter how subjective or arbitrary. Instead, the assessment of the things of value must be connected, even if only indirectly, to the integrity of federal program funds." *U.S. v. Foley*, 73 F.3d 484, 490 (2d Cir. 1996).

Congress will not be seen as having made "conduct readily denounced as criminal by the states" a federal offense unless it "clearly" states this purpose. *U.S. v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971). *See Gregory v. Ashcroft*, 501 U.S. 452, 461, 115 L.Ed.2d 410, 111 S.Ct. 2395 (1991) ["this plain statement rule is nothing more than an acknowledgment that the states retain substantial sovereign powers under our constitutional scheme, powers with which Congress does not readily interfere"].

This Court has long required that Congress speak with particular clarity if it intends to criminalize the sort of conduct that historically has been prosecuted by the states. *See U.S. v. Bass*, 404 U.S. 336, 349, 30 L.Ed.2d 488, 92 S.Ct. 515 (1971); *Williams v. U.S.*, 458 U.S. 279, 287, 290, 73 L.Ed.2d 767, 102 S.Ct. 3088 (1982); *U.S. v. Enmons*, 410 U.S. 396, 411-12, 35 L.Ed.2d 379, 93 S.Ct. 1007 (1973); *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 67 S.Ct. 1146, 1152 (1947). Congress did not do so in § 666 despite the fact that "[m]ost if not all States criminally prosecute bribery and acceptance of bribes." *Dixson v. U.S.*, 465 U.S. 482, 512 n.*, 79 L.Ed.2d 458, 104 S.Ct. 1172 (1984) [O'Connor, J., dissenting].

Congress expressly limited federal jurisdiction under § 666 to criminalize the bribery of, and solicitation of bribery by, state and local officials in connection with their administration of federal funds. But Congress nowhere indicated any intent to reach virtually all bribery involving state and local officials, even where, as here, the bribery has no connection to any federally funded program. Accordingly, if Congress intends that

the federal criminal statutes reach all such bribery, however attenuated the connection to any federal funds, Congress should be directed to "speak more clearly than it has." *McNally v. U.S.*, 483 U.S. 350, 360, 97 L.Ed.2d 292, 107 S.Ct. 2875 (1987).

Just as overreaching by the federal government can obscure political accountability, *see U.S. v. Lopez*, 115 S.Ct.1624, 1638, 131 L.Ed.2d 626 (1995) [Kennedy, J., concurring], overreaching into areas particularly amenable to the state political process can usurp the electorate's role as the primary watchdog over its elected officials and their actions. *See generally U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 131 L.Ed.2d 881, 115 S.Ct. 1842, 1863-64 (1995) [discussing electorate's important role in governing under our republican government]. Because policing the ethical behavior of state and local public officials is uniquely amenable to the state electoral process, absent a clear threat to a significant federal interest, federal law should not be read to sanction Congressional oversight of state government. *See Dixson v. U.S.*, 465 U.S. 482, 509-11, 79 L.Ed.2d 458, 104 S.Ct. 1172 (1984) [O'Connor, J., dissenting] (recognizing that application of bribery statute to state or local government raises significant problems of autonomy and federalism).

7. CONJUGAL VISITS DO NOT CONSTITUTE "ANYTHING OF VALUE" OF $5,000 OR MORE

Moreover, the conjugal visits provided to Homero Beltran in exchange for $5,000 and $6,000 cash payments must constitute a thing valued at $5,000 or more in connection with the Hidalgo County Jail's business which

the federal government has an interest in policing. The cash for contact and conjugal visits transactions do not present a clear threat to a federal interest, but instead present a wrong historically within the police powers of the state.

Recently, in *McNally v. U.S.*, 483 U.S. 350, 360 (1987), the Court rejected the government's claim that the mail fraud statute, 18 U.S.C. § 1341, criminalized schemes that deprived the citizenry of their right to "honest government services." Before § 1341 would be read to intrude so dramatically on traditional state criminal jurisdiction, said the Court, Congress would have to "speak more clearly." *McNally v. U.S.*, 483 U.S. 350, 360 (1987). In particular, application of § 1341 to otherwise lawful conduct of state and local government officials would "take a much clearer indication" of congressional intent. *McNally v. U.S.*, 483 U.S. 350, 360 (1987).

A. Even if the contractual arrangement between the USMS and Hidalgo County constitutes a Federal program for jurisdictional purposes, the statute is still inapplicable because the corrupt acts in this case did not affect any federal interest that § 666 is intended to protect. Thus, pursuant to the plain language and legislative history of the statute, as well as the principles of federalism and rule of lenity discussed above, Marmolejo's and Salinas' convictions must be reversed.

The clear congressional objective in enacting § 666 was to safeguard the integrity of federal funds, rather than ensuring the integrity and honesty of public servants generally. The text of the statute targets only those organizations which administer federal funds disbursed

pursuant to a federal program. Moreover, § 666(a) requires the theft or embezzlement of at least $5,000 worth of property from the organization receiving federal funds, or, with respect to bribery, the wrongdoer must act with the intent to influence or be influenced "in connection with any business, transaction, or series of transactions of such organization . . . involving anything of value of $5,000 or more." 18 U.S.C. § 666(a). Thus, according to its language, § 666 is clearly aimed at vindicating acts which adversely affect financial resources.

A congressional intent to protect funds in which the government retains an interest also finds support in § 666's legislative history. With respect to bribery in particular, Congress enacted § 666 to alleviate the difficulties in prosecuting bribery under 18 U.S.C. § 201. Section 201's primary objective, clearly supported by its text and legislative history, is to promote and maintain high ethical standards of behavior of persons holding positions of public trust. *See* S.Rep. No. 2213, 87th Cong., 2d Sess. 1962, *reprinted in* 1962 U.S.C.C.A.N. 3852, 3853-56 [hereinafter S.Rep. No. 2213]; *U.S. v. Dixson*, 465 U.S. 482, 491-96 (1984). The language of § 201 does not even remotely require a threat to federal funds as a prerequisite to prosecution; instead, Congress enacted § 201 to ensure the honest services of people performing a broad spectrum of official duties. Section 201's applicability hinges upon whether the corrupt activity involves a "public official or person who has been selected to be a public official."[5] *See* 18 U.S.C. § 201(b)&(c). Although

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[5] "The term 'any person acting for or on behalf of the United States' was coined in the recodifications of the 1870's,

"public official" is defined broadly, and includes anyone "acting for or on behalf of the United States, or any department, agency or branch of Government thereof," *see* 18 U.S.C. § 201(a), courts have had difficulty demarcating the limits of the government's interest in ensuring the honesty of people potentially connected to the federal government. In particular, at the time of § 666's enactment, courts were divided on whether a person employed by a private organization receiving Federal monies was a public official for purposes of § 201. *See* S.Rep. No. 225 at 3510-11.

Section 666 alleviates this problem by protecting the integrity of federal funds directly, rather than protecting the integrity of the persons charged with administering them. Unlike § 201, which focuses on whether a sufficient nexus exists between the person administering the federal funds and the federal government, § 666's text and legislative history focus on whether a sufficient nexus exists between the corrupt acts and the federal government's interest in protecting the objects of those acts, namely, federal funds disbursed to achieve public policy goals. Although federal funds arguably do not have to be directly implicated by the corrupt transaction, the general dishonesty of the wrongdoers, completely unrelated to a threat to federal funds, clearly is not enough under § 666.

Rev. Stat. §§ 5451, 5501, and replaced the phrase 'person holding any place of [public] trust or profit, or discharging any official function under, or in connection with [the Government],' which appeared in previous statutes." *U.S. v. Dixson*, 465 U.S. 482, 493 n.11 (1984).

B. Marmolejo and Salinas were charged with accepting "anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transaction of [Hidalgo County Jail] involving anything of value of $5,000 or more." 18 U.S.C. § 666(a)(1)(B). Specifically, Marmolejo and Salinas allegedly received money in excess of $5,000 in exchange for arranging conjugal visits for a federal prisoner. Their alleged conduct did not even remotely affect, either directly or indirectly, the federal funds appropriated by the federal government to house prisoners. Thus, as the dissent in the court below correctly recognized, the bribery transaction did not threaten any federal interest which § 666 serves to protect. *See U.S. v. Marmolejo*, 89 F.3d 1185, 1201 (5th Cir. 1996).

The majority's difficulty in determining whether the bribery scheme influenced a transaction involving "anything of value of $5,000 or more," only serves to underscore the fact that federal funds were not threatened by the scheme. The statute's language is ambiguous with respect to whether the "anything of value of $5,000 or more," which triggers prosecution under § 666, is valuated from the perspective of the receiving party or the organization whose business is affected by the bribery scheme.

The fact that a dollar sum is placed on the second "anything of value" is consistent with Congress's intent to vindicate "significant" acts of theft or bribery from the government's perspective, and to vindicate only those acts which ultimately implicate things capable of monetary valuation. Thus, the language of the statute coupled with the clear legislative intent, strongly suggests that the

bribery scheme must ultimately impact the distribution or disbursement of federal funds.

Conjugal visits simply are not worthy of monetary valuation from the government's perspective. As previously explained, Congress's purpose in enacting § 666 is to protect the integrity of federal funds, not to ensure honest services generally. That the court below had difficulty placing a monetary value on the conjugal visits only underscores the fact that no significant federal monetary interests were implicated. Thus, although the alleged bribery scheme clearly involved dishonesty, § 666 is simply not the proper vehicle for vindicating the conduct in this case.

CONCLUSION

It thus cannot be presumed that Congress intended in § 666 to vastly expand federal criminal jurisdiction – to reach virtually all bribery involving state and local officials – without any mention in its text, statutory findings, or legislative history. Instead, under *Bass* and its progeny, before courts may construe a federal criminal statute to so fundamentally alter the relationship between federal and state governments, Congress must have clearly stated its intent to do so. Congress has made no such statement here.

The appropriate course, therefore, is to read the phrase "anything of value of $5,000 or more" in § 666(a)(1)(B) to parallel "$10,000 under a Federal program" in § 666(b). This construction criminalizes bribery of public officials when the transaction at issue involves a

minimum of $5,000 in federal funds. Such a reading is fully consistent with the federal interests identified in the legislative history: protecting the integrity of federal funds, whether those funds are being administered by federal officials, or by officials of state or local government or private organizations.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1996

MARIO SALINAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 666(a)(1)(B), which prohibits the acceptance of a bribe by an official of a local government agency that receives more than $10,000 in federal assistance in a year, requires the government to prove that the bribe affected or could have affected the federal funds received by the agency.

2. Whether the RICO conspiracy statute, 18 U.S.C. 1962(d), requires proof that the defendant agreed personally to commit two predicate acts of racketeering.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-47) is reported at 89 F.3d 1185.

JURISDICTION

The judgment of the court of appeals was entered on July 15, 1996. A petition for rehearing was denied on August 15, 1996. Pet. App. 48. The petition for a writ of certiorari was filed on November 12, 1996, and was granted on February 24, 1997, limited to the second and third questions presented (J.A. 167). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of 18 U.S.C. 666, 1961, 1962, and 4002 are reproduced *infra*, at App. 1a-9a.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiring to conduct or participate in the conduct of the affairs of an enterprise through a pattern of racketeering activity (RICO conspiracy), in violation of 18 U.S.C. 1962(d), and two counts bribery by an agent of an entity receiving more than $10,000 in federal funds, in violation of 18 U.S.C. 666(a)(1)(B) and 18 U.S.C. 2 (aiding and abetting); he was acquitted on one count of racketeering, in violation of 18 U.S.C. 1962(c). Petitioner was sentenced to 36 months' imprisonment, to be followed by three years' supervised release; he also was fined $5,000. The court of appeals affirmed.

1. At the relevant times, petitioner was the Divisional Chief for Detention of the Hidalgo County Sheriff's Office. His co-defendant, Brigido Marmolejo, Jr., was the Sheriff of Hidalgo County.[1] Marmolejo was responsible for the operation of the Hidalgo County Jail, and petitioner was his second in command at the Jail. Pet. App. 1-2; Tr. 48-52.

The Hidalgo County Jail was built and improved with an $850,000 federal grant issued pursuant to a grant contract executed between the United States Marshals Service and Hidalgo County in May 1984. J.A. 31-40. Under that grant agreement, the County agreed to house federal prisoners in the completed facility. J.A. 35. The agreement between the federal government and the County was authorized by 18 U.S.C. 4002, which establishes a federal program for providing "suitable quarters for the safekeeping,

[1] Marmolejo is a respondent in this Court under this Court's Rule 12.6 and has filed a brief supporting petitioner.

care, and subsistence" of persons held in custody under federal law.

A secondary agreement between the Marshals Service and the County, executed by Sheriff Marmolejo on behalf of the County, established specific provisions for the County's housing of federal prisoners, including the compensation to be paid to the County. See J.A. 41-52. Under that agreement, it was estimated that the federal government would pay the County approximately $915,000 annually for housing federal prisoners. J.A. 43.

The Hidalgo County Jail did not permit conjugal visits. During most visits, the inmate was separated from his visitors by a glass partition. The Jail also allowed one 30-minute family contact visit during a prisoner's incarceration (additional contact visits might be permitted at the discretion of Jail officials in special cases, such as a death in the family). Contact visits took place in the attorney visiting room, the booking area, or the detention squad room, and were subject to observation by guards. Under the Jail's policy, if an ordinary contact visit became too physically intimate, the guards, after a warning, would terminate the visit. See Tr. 61-62, 76-78, 119-121, 767-769, 797.

2. Homero Beltran-Aguirre (Beltran) was a federal prisoner housed in the Hidalgo County Jail pursuant to the County's agreement with the federal government. Beltran was transferred to the Jail on June 7, 1991, and remained there until April 14, 1992, when he was transferred to another facility. Beltran returned to the Jail on November 6, 1992, and remained there until April 26, 1993. Pet. App. 2.

In August or September 1991, Beltran agreed to pay Marmolejo a series of bribes in exchange for conjugal

visits at the Hidalgo County Jail. Beltran agreed to pay Marmolejo a fixed rate of $6,000 per month for weekly visits with his wife, and also to pay $1,000 for each such visit. Beltran also paid for intimate contact visits with his girlfriend on at least five occasions. The visits occurred two days a week during the period in which Beltran was incarcerated at the Jail. See Tr. 140-141, 143-148, 218-219, 233, 253, 273-274, 476, 502-503, 547, 910-914.

Several of the visits occurred in Sheriff Marmolejo's office. On a few occasions, petitioner stood outside the office supervising the visits. Tr. 231, 253, 502-503, 544. Marmolejo also told Beltran's brother-in-law, Juan Antonio Guardado, who arranged for some of the payments, that whenever the Sheriff was unavailable, petitioner should be contacted about the conjugal visits. Tr. 253, 502-503, 547.

In January 1992, Beltran instructed Guardado to purchase four pairs of Rado watches. The watches cost Beltran approximately $8,500. Beltran and Guardado gave petitioner and Marmolejo each a pair of watches, and told petitioner to give another pair to Captain Andres Alaniz, which he did. On another occasion, Guardado gave petitioner a 1984 Chevrolet Silverado pickup, valued at $3,000-$4,000. See Tr. 235-237, 497-501, 561, 756.

3. The RICO conspiracy count of the indictment, Count 2, alleged that "each defendant agreed that two or more of the acts of racketeering activity, as specified in paragraph 7 of Count One, * * * would be committed in the conduct of the affairs of the enterprise." J.A. 89. The alleged pattern of racketeering activity consisted of 14 state felony bribery offenses, in violation of Texas Penal Code, Section

36.02(a).[2] There was no allegation that each defendant agreed personally to commit two racketeering acts.

At trial, petitioner requested an instruction that, in order to find him guilty of RICO conspiracy, the jury was required to find that he agreed personally to commit two racketeering acts. Although the government did not object to that proposed charge, the district court rejected it. The court stated that the case should be submitted to the jury under "classic conspiracy law" (J.A. 116): "As long as I tell them that he has to know that the object of the conspiracy is running the enterprise with a pattern of racketeering, involving more than two acts, knowing that, did he then, at some point, join in to participate in assisting that conspiracy to be run. It seems to me that's classic conspiracy law with RICO." *Ibid.*; see also J.A. 109-111. Accordingly, the court instructed the jury as follows:

> So what the government has to prove is that the two of these gentlemen reached an agreement with each other that they were going to run the Sheriff's Office through a pattern of racketeering acts, that they were going to run the Sheriff's Office through a system of collecting bribes from one of these prisoners in return for doing favors for him, and that each of the defendants knew that

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[2] That Texas offense provides that a person commits a second-degree felony punishable by up to 20 years' imprisonment if "he intentionally or knowingly * * * accepts * * * from another: (1) any benefit as consideration for the recipient's * * * exercise of discretion as a public servant." Tex. Penal Code Ann. § 36.02(a) (West 1994); see *id.* § 36.02(e) (designating the offense as second-degree felony); *id.* § 12.33(a) (defining punishment for second-degree felony).

that was the idea and that each of them willfully joined in.

J.A. 137-138.

4. A divided panel of the court of appeals affirmed petitioner's convictions. Pet. App. 1-47. Judge Jolly dissented with respect to the bribery convictions. *Id.* at 37-47.

a. The court first rejected petitioner's contention that his acceptance of bribes did not fall within the reach of 18 U.S.C. 666 because the County Jail had not received "[f]ederal assistance" exceeding $10,000 in a year. Petitioner contended that the federal funds received by the County pursuant to its contract with the Marshals Service to house prisoners were simply payments for services rendered, and therefore were not "[f]ederal assistance" within the meaning of the statute. The court noted, however, that the contract to house prisoners was "interrelated" with the federal government's grant of funds to the County for jail construction, since, "[a]s a condition to the receipt of this grant, Hidalgo County Jail had to guarantee that it would provide detention space for federal prisoners." Pet. App. 6-7. Accordingly, the court concluded that the grant agreement and the contract, together, constituted "[f]ederal assistance" or a "[f]ederal program" within the meaning of Section 666(b). Pet. App. 7.

The court also concluded that, even with respect to the contract payments alone, petitioner's argument that the funds for housing prisoners were not "[f]ederal assistance" must fail. The court noted that the purpose of Section 666 is to protect the integrity of federal programs for which there is a "specific statutory scheme authorizing the Federal assistance

in order to promote or achieve certain policy objectives." Pet. App. 8 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 371 (1983)). To determine whether federal funds were "[f]ederal assistance," the court therefore asked "whether the funds disbursed [could] be considered Federal assistance within a specific scheme intended to promote public policy objectives and not payments by the government as a commercial entity." *Ibid.* Because the funds provided by the federal government in this case were intended to fulfill the government's policy of providing for the safekeeping and care of prisoners in federal custody, it was irrelevant, the court concluded, that the government received something in return for the assistance it provided to the County. *Ibid.*

b. The court also rejected petitioner's argument that permitting Beltran to have conjugal visits in the County Jail was not a transaction involving "anything of value of $5,000 or more," as required by Section 666(a)(1)(B). The court noted, first, that under circuit precedent, Section 666(a)(1)(B) "does not require the government to prove that federal funds were directly involved in a bribery transaction, or that the federal monies funded the corrupt transaction." Pet. App. 10-11. It also noted that the phrase "*anything* of value" is "broad in scope and contains no language restricting its application to transactions involving money, goods, or services." *Id.* at 11 (emphasis added). The court therefore concluded that the phrase includes "transactions involving intangible items, such as the conjugal visits at issue in this case." *Ibid.* "Because the conduct in this case involves serious acts of bribery by agents of a local government who were carrying out their duties under a Federal program," the court stated, "this case is

within the scope of conduct Congress intended to encompass within 18 U.S.C. § 666." *Id.* at 14.

The court observed further that "[t]he transactions involved something of value—conjugal visits that Beltran was willing to pay for." Pet. App. 16. Because Beltran was willing to pay more than $5,000 to obtain conjugal visits, the court held that the visits had a value of more than $5,000. The court reached that conclusion "in the same way an appraiser would value an asset—by looking at how much a person in the market would be willing to pay for [the visits]." *Id.* at 17-18.

c. The court further rejected petitioner's contention that the trial judge erred in refusing to instruct the jury that, to find petitioner guilty of RICO conspiracy, it was required to find that he agreed personally to commit two predicate acts of racketeering. Pet. App. 21-26. The court reasoned that nothing in the language of the RICO conspiracy provision, 18 U.S.C. 1962(d), "indicates that Congress intended to do anything more than to criminalize a conspiratorial objective—the violation of a substantive RICO provision." Pet. App. 24. To accept petitioner's argument that RICO conspiracy contains a special element of agreement personally to commit an offense "would be a marked departure from traditional conspiracy law for which there is no support in the language of the statute or the legislative history." *Id.* at 25.

SUMMARY OF ARGUMENT

I. Petitioner's conviction satisfied all the elements of the offense of bribery under 18 U.S.C. 666(a)(1)(B). The evidence established, beyond a reasonable doubt, that petitioner was an agent of an

agency of local government, the Hidalgo County Sheriff's Office; that the Sheriff's Office received more than $10,000 in a year in federal assistance; that petitioner corruptly accepted, or aided and abetted the acceptance of, bribes from Beltran in return for a transaction of the Sheriff's Office (allowing Beltran to have conjugal visits at the Jail); and that those conjugal visits were something of value worth at least $5,000. The government was not required to show, in addition, that the transactions (the conjugal visits) involved the disbursement or affected the integrity of federal funds.

The text of the statute does not require the government to prove that a bribe made unlawful under Section 666(a)(1)(B) affected or could have affected federal funds. The statute expressly prohibits bribe-taking in connection with "any * * * transaction" of the agency, reaching broadly to cover any transaction of any kind whatsoever, as long as the transaction involves a matter worth at least $5,000. Congress did not limit the statute to transactions shown in a particular case to involve or affect federal funds.

The legislative history of Section 666 also provides no basis for the limited construction suggested by petitioner. That history suggests, at most, that Congress was particularly concerned about bribery that would affect the integrity of federal funds. It does not indicate, however, that Congress intended to limit the offense to cases where a threat to federal funds was established at trial as an element of the offense. Certainly the legislative history does not compel that conclusion to the extraordinary degree that would be necessary to disregard the plain language of the statute.

Section 666(a)(1)(B) is a valid exercise of Congress's spending power. Under the spending power, Congress may attach reasonable conditions to the receipt of federal funds by local governmental entities. In Section 666, Congress has required that officials of local governments receiving federal funds adhere to high standards of integrity, even if those officials do not themselves disburse federal funds. Those officials may, as in this case, be responsible for administering a federal program, and their corrupt activities may jeopardize the attainment of the federal program's ends. More generally, Congress was entitled to conclude that agencies receiving federal money must be free of significant corruption, since an agency with problems of corruption in the implementation of state and local affairs might also be untrustworthy in handling federal monies or implementing a federal program.

II. Petitioner's conviction under 18 U.S.C. 1962(d) for conspiracy to violate the RICO statute also is valid. The district court properly instructed the jury that it could find petitioner guilty if it found that he had agreed with his co-conspirators that they would operate an enterprise (the Sheriff's Office) through a pattern of racketeering acts (the collection of bribes from a prisoner), including at least two acts of racketeering. The jury was not required to find also that petitioner agreed to commit two acts of racketeering personally.

Under traditional principles of conspiracy law, a defendant may be found guilty of conspiracy upon proof that he agreed with his co-conspirators that a crime would be committed by some member of the conspiracy. There is no requirement that each conpirator agreed to commit the object crime personally.

That rule follows from the nature of a conspiracy as a partnership in crime, in which the partners act for each other in their joint effort to commit offenses.

Congress is presumed to adopt the settled meanings of common law terms that it includes in statutes, and so is presumed to have adopted settled aspects of conspiracy law when it defined the offense of conspiring to violate RICO. The RICO conspiracy statute, 18 U.S.C. 1962(d), makes it an offense to conspire to violate a substantive provision of RICO. Section 1962(d) does not alter the nature of a conspiracy by adding any new requirement that the defendant agree personally to commit the predicate acts of racketeering.

That construction of the RICO conspiracy offense serves Congress's overarching objective in RICO of combatting organized crime. A principal practical difficulty with prosecuting leaders of organized-crime operations has always been that such leaders insulate themselves from the actual commission of offenses. A requirement that conspirators be shown to have agreed to commit two acts of racketeering personally could inhibit the government's ability to prosecute members of organized-crime operations who agree and lend assistance to the commission of crimes through an enterprise but who do not commit the crimes themselves. And requiring proof of agreement to commit the predicate crimes personally is not necessary to preserve the elements of the object RICO violation involving Section 1962(c), namely, that an enterprise exist, that the predicate crimes constitute a pattern, and that the racketeers conduct or participate in the conduct of the enterprise. To be guilty of such a conspiracy to violate RICO, one must not merely agree to the commission of two

racketeering crimes; one must agree to the conduct of the affairs of an enterprise through a pattern of racketeering crimes. Thus, the government must show that the co-conspirators anticipated the pursuit of ongoing, related criminal activity through a formal or informal arrangement with an ascertainable structure.

ARGUMENT

I. PETITIONER'S CONVICTION SATISFIED ALL THE ELEMENTS OF THE OFFENSE UNDER 18 U.S.C. 666(a)(1)(B)

Petitioner was convicted on two counts of violating 18 U.S.C. 666(a)(1)(B). Section 666(a)(1)(B) provides, in pertinent part:

> (a) Whoever, if the circumstance described in subsection (b) of this section exists —
>
> (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof —
>
> * * * * *
>
> (B) corruptly solicits or demands for the benefit of any person of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;
>
> * * * * *

> shall be fined under this title, imprisoned not more than 10 years, or both.

The "circumstance described in subsection (b)" referred to in the first clause of Section 666(a)(1)(B) is that "the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. 666(b).

Accordingly, to obtain a conviction under Section 666(a)(1)(B), the government must show (as relevant here) that (1) the defendant was an agent of an agency of local government; (2) the defendant's agency received more than $10,000 in a year in federal assistance; (3) the defendant corruptly accepted something of value intending to be influenced in connection with transactions of his agency; and (4) the transactions of the agency influenced by the corrupt payment involved something worth at least $5,000. All of those elements were proven beyond a reasonable doubt at petitioner's trial. The statute establishes no further elements of the offense.

Petitioner contends nonetheless (Pet. Br. 5-24) that his conduct was not encompassed by Section 666. Primarily, petitioner argues that Section 666 required the government to prove at trial that his acceptance of a bribe had, or could have had, an impact on federal funds. There is no such requirement in the statute, nor should one be implied.

Petitioner also argues (Pet. Br. 15-23) that the government did not establish either (1) that the Hidalgo County Sheriff's Office received $10,000 in annual "benefits" under a federal program or (2) that he was an agent of an agency of local government.

Neither contention is fairly included in the questions on which the Court granted review, and, in any event, both claims are incorrect.

A. Section 666 Does Not Contain An Implicit Requirement That A Bribe Must Affect Federal Funds

Petitioner does not contest that he corruptly accepted, and aided and abetted Sheriff Marmolejo's acceptance of, bribes in exchange for Beltran's conjugal visits, or that permitting those conjugal visits were transactions of the Sheriff's Office within the meaning of Section 666. He also does not contest that those conjugal visits, for which Beltran paid $6,000 per month and $1,000 per visit, constituted "anything of value of $5,000 or more." He argues, however (Pet. Br. 6), that Section 666 requires that the $5,000 transaction influenced by the bribe be shown to be a matter that affects the disbursement or integrity of the federal funds received by the local government agency. That contention is without any basis in the statute.[3]

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[3] All the courts of appeals that have addressed the precise issue presented here have rejected the contention that the bribe-taking must be shown to have an impact on federal funds. See *United States* v. *Paradies*, 98 F.3d 1266, 1288-1289 (11th Cir. 1996), petition for cert. pending, No. 96-1346; *United States* v. *Bonito*, 57 F.3d 167, 172-173 (2d Cir. 1995), cert. denied, 116 S. Ct. 713 (1996); *United States* v. *Coyne*, 4 F.3d 100, 108-109 (2d Cir. 1993), cert. denied, 510 U.S. 1095 (1994); *United States* v. *Simas*, 937 F.2d 459 (9th Cir. 1991); *United States* v. *Westmoreland*, 841 F.2d 572, 576 (5th Cir.), cert. denied, 488 U.S. 820 (1988).

In *United States* v. *Foley*, 73 F.3d 484, 492-493 (1996), the Second Circuit, relying on an "infer[ence] from the legislative history that * * * section [666] was not designed for the prosecution of corruption that was not shown in some way to touch upon federal funds," held that the corruption must involve a transaction valued at $5,000 or more from the perspective of the entity that receives the federal financial assistance. That construction also has no basis in the text of Section 666. The statute flatly prohibits corrupt acceptance of bribes by an agent of a recipient of federal funds to influence a transaction of the recipient "involving anything of value of $5,000 or more"; it does not require that the thing of value be measured by its worth to the recipient of the funds rather than the bribe giver. The $5,000 requirement represents a congressional determination that corruption in transactions of a magnitude of $5,000 or more itself poses a threat to the integrity of federal funds and programs. The *Foley* court's extra-textual limitation on the statute would effectively immunize corrupt transactions involving payments of $5,000 or more for government benefits that are difficult to value from the perspective of the government, such as licenses, exemptions, approvals, and numerous other regulatory actions. The restriction is thus unfounded.

1. Section 666 contains no language requiring a showing that a bribe directly or indirectly affect federal funds. Rather, what Section 666 requires is that the bribe be in connection with "*any* business, transaction, or series of transactions of [an] organization, government, or agency" that itself receives federal funds. 18 U.S.C. 666(a)(1)(B) (emphasis added).[4] "Read naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *United States* v. *Gonzales*, 117 S.

[4] Likewise, the theft offense defined by Section 666(a)(1)(A) requires only that the property stolen have a value of $5,000 or more and be under the custody or control of the organization receiving the requisite $10,000 in federal funds. There is no requirement that the $5,000 stolen have any connection with the federal funds. All that is required is that the property have a connection with the organization receiving federal funds.

Ct. 1032, 1035 (1997) (quoting *Webster's Third New International Dictionary* 97 (1976)). Congress did not include a limiting phrase such as "involving federal funds" or "in connection with federal funds," although it easily might have done so if there had been an intention to so limit the statute. See *United States* v. *Westmoreland*, 841 F.2d 572, 576 (5th Cir.) (Section 666 "contains nothing to indicate that 'any transaction involving $5,000' means 'any federally funded transaction involving $5,000' or 'any transaction involving $5,000 of federal funds,' and other subsections of the statute contain no inconsistent provisions that might suggest such a qualification"), cert. denied, 488 U.S. 820 (1988). The purpose of omitting such a limitation is evident: rather than adopting a cumbersome requirement of tracing federal dollars to particular corrupt activities, Section 666, as drafted, "allow[ed] Congress to ensure the integrity of federal funds by protecting the integrity of the organizations that receive them." Pet. App. 16. Accordingly, "any transaction" must be given its plain meaning; there is no requirement that it be a transaction involving or implicating federal funds.

Petitioner contends (Pet. Br. 11-15) that Section 666 contains no "clear statement" that it is to be applied to bribery of state officials, and that such a clear statement is required by *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *McNally* v. *United States*, 483 U.S. 350 (1987). That contention is plainly incorrect. Section 666 by its express terms prohibits acceptance of bribes by anyone who is an "agent of * * * a State, local, or Indian tribal government, or any agency thereof." 18 U.S.C. 666(a)(1). No further language is necessary to make clear that Section 666 applies to

corruption of local officials who are agents of recipients of federal funds, whether or not federal funds are involved in the corrupt transaction.

2. In contending that Congress intended to reach corrupt bribe-taking only when shown to pose a threat to the federal funds received by recipients of grant assistance, petitioner relies on the legislative history of Section 666. But there is no basis here for adding a significant limitation to the scope of a clear criminal prohibition on the theory that the limiting principle may be found in the legislative history. See *Gonzales*, 117 S. Ct. at 1035 ("Given the straightforward statutory command, there is no reason to resort to legislative history."). As we have explained, the text of Section 666 is plain and evinces no limitation of the offense to bribe-taking that is proven to endanger federal funds.

Even if a truly compelling showing based in the legislative history could justify a departure from the statutory language in this case, the legislative history of Section 666 does not yield the "extraordinary showing" that would be necessary to conclude that Congress intended to enact the restricted reading of the statute put forward by petitioner rather than the plain meaning of the text. Cf. *United States* v. *Albertini*, 472 U.S. 675, 680 (1985); *National Organization for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 261 (1994). The Senate Judiciary Committee Report accompanying Section 666 explained that the statute was enacted in part because of uncertainty about the reach of 18 U.S.C. 201, which prohibits corrupt bribery of "any public official," including any "person acting for or on behalf of the United States," 18 U.S.C. 201(a). See S. Rep. No. 225, 98th Cong., 1st Sess. 369-370 (1983). At the time that Section 666 was

enacted, the courts of appeals were divided as to whether Section 201(a) applied to state officials and employees of private entities that had not contracted directly with the federal government. That uncertainty was eventually resolved by this Court in *Dixson* v. *United States*, 465 U.S. 482, 499 (1984), which held that a person employed by a state government or private organization may be a "public official" within the meaning of Section 201, if he or she "possess[es] some degree of official responsibility for carrying out a federal program or policy." The Senate Report indicated that Congress wanted the new Section 666 to reach at least as far as lower court decisions that, at the time, had construed Section 201 to cover persons who had not entered into a direct contractual relation with the federal government, but who had responsibility for administering federal programs. See S. Rep. No. 225, at 370 & nn.2, 3 (discussing court of appeals cases).

Rather than amend Section 201 or draw on language in an earlier proposed bill that expressly required a link between the bribe and a federal program,[5] however, Congress created an entirely "new

[5] The Committee Report indicated that Section 666 was "derived" from a bribery provision in an earlier, unenacted proposed comprehensive revision of Title 18. S. Rep. No. 225, at 369 & n.1; see S. Rep. No. 307, 97th Cong., 1st Sess. 802-804 (1981). That earlier provision would have defined a federal offense of "commercial bribery" where the defendant was an agent or fiduciary of "an organization charged by Federal statute, or by a regulation issued pursuant thereto, with administering monies or property derived from a Federal program, and if the recipient's conduct is related to the administration of such program." *Id.* at 803; see S. 1630, 97th Cong., 1st Sess. § 1751(c)(1)(I) (1981). In Section 666, however, Congress enacted no condition that the conduct be "related

offense[]" (S. Rep. No. 225, at 369) with a different scope from that of Section 201. Whereas Section 201 reaches bribery by anyone who implements a federal program, regardless of the value of the transaction affected by the bribe or the amount of federal assistance received by the bribe-taker's organization, Section 666 reaches corrupt bribery whether or not the agent is exercising "official responsibility for carrying out a federal program or policy" (*Dixson*, 465 U.S. at 499), but only if the agent is associated with a recipient of $10,000 or more annually of federal assistance, and only if the bribe involves a transaction of the agency worth at least $5,000.

The Senate Report stated that Section 666 should be construed broadly, to achieve its purpose of protecting funds distributed through federal programs from bribery, fraud, and theft. S. Rep. No. 225, at 370. The Report did not suggest, however, that the statute should be construed to achieve only that purpose. Congress evidently believed that recipients of significant federal assistance should be held to the highest standards of integrity, and that any significant corrupt transaction by an agent of those recipients, whether or not the corruption directly endangers federal funds, triggers federal concern. That view is reasonable; a state or local official who engages in corrupt bribe-taking with respect to state monies and transactions might well do the same with respect to a transaction involving federal funds.

to the administration of" the program receiving federal assistance, even though it could have easily used language from the proposed legislation of the 97th Congress to create such a requirement.

While the Senate Report suggests that Congress's main purpose in enacting Section 666 was to protect funds distributed through federal programs, it does not support the claim that Congress intended to require prosecutors to show in each case that the corrupt transactions impaired federal funds. The unqualified language used by Congress in Section 666 leaves no room for any such argument. Evidence that some members of Congress had particular fact patterns in mind when they recommended the enactment of Section 666 provides no basis for limiting the application of the statute to those particular factual scenarios. See *Albertini*, 472 U.S. at 681-682 (noting that, although congressional debates suggested that the primary purpose of 18 U.S.C. 1382 was to punish spies and panderers for repeated entry into military installations, the text of the statute was not limited to such persons and did not preclude application to political protesters); *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 500 (1985) (declining to create "racketeering injury" requirement to RICO civil action when such requirement did not exist in text of statute, even while recognizing that RICO "is evolving to something quite different from the original conception of its enactors").

3. Petitioner and *amicus* NACDL suggest that, unless Section 666 is narrowly construed to reach only acts of bribery that affect federal funds, it exceeds Congress's legislative authority under the Constitution. See Pet. Br. 14-15; NACDL Br. 23-29. That argument is without merit. Section 666 is a valid exercise of Congress's spending power under Article I, Section 8, Clause 1, which authorizes Congress to "provide for the common Defence and general Welfare of the United States." Section 666 ensures

that States and local governmental units that accept federal financial assistance exceeding $10,000 in a year will adhere to high standards of integrity, and requires that they act through agents who do not abuse their positions of public trust by corruptly accepting bribes in conducting official business. The requirement that officials whose agencies administer significant federal program funds refrain from accepting bribes in any substantial transaction (whether or not it involves the federal funds) is a reasonable and appropriate method of ensuring the integrity of the administration of the federal funds.

"Incident to [its spending] power, Congress may attach conditions on the receipt of federal funds, and has repeatedly employed the power 'to further broad policy objectives by conditioning receipt of federal moneys upon compliance by the recipient with federal statutory and administrative directives.'" *South Dakota* v. *Dole*, 483 U.S. 203, 206 (1987) (quoting *Fullilove* v. *Klutznick*, 448 U.S. 448, 474 (1980) (opinion of Burger, C.J.)). Moreover, Congress may permissibly accomplish objectives through the use of the spending power even if those objectives are "not thought to be within Article I's 'enumerated legislative fields'" such as the Commerce Clause power. *Id.* at 207 (quoting *United States* v. *Butler*, 297 U.S. 1, 65 (1936)). "The offer of benefits to a state by the United States dependent upon cooperation by the state with federal plans, assumedly for the general welfare, is not unusual." *Oklahoma* v. *Civil Service Comm'n*, 330 U.S. 127, 144 (1947).

The spending power is subject to three "general" restrictions, *Dole*, 483 U.S. at 207, all of which are met here. First, the spending must be for the "general welfare," a matter to which substantial

deference is given to the judgment of Congress. See *ibid.*; *Helvering* v. *Davis*, 301 U.S. 619, 640-641 (1937). This case, however, does not involve any challenge to the propriety of the *expenditures* authorized by Congress (as was true in *Helvering* v. *Davis*) but rather to the conditions placed on that spending. In any event, no deference is required to see the prudence of requiring high standards of integrity at agencies involved in administering federally funded programs.

The second limitation is that the condition on the receipt of federal funds must be clearly stated, "enabl[ing] the States to exercise their choice knowingly, cognizant of the consequences of their participation." *Dole*, 483 U.S. at 207 (quoting *Pennhurst State School & Hospital* v. *Halderman*, 451 U.S. 1, 17 (1981)). The prohibition on bribery in Section 666 is stated expressly on the face of the statute. And the prohibition may permissibly fall on the *employee* even though it is the governmental *agency* that receives the funds. In *Oklahoma* v. *Civil Service Commission*, *supra*, the Court upheld, as a valid exercise of authority under the spending power, federal restrictions on partisan political activities by state employees whose employment was connected to any activity financed in whole or part by federal funds. 330 U.S. at 143-144.

Third, the Court has suggested that "conditions on federal grants might be illegitimate if they are unrelated 'to the federal interest in particular national projects or programs.'" *Dole*, 483 U.S. at 207 (quoting *Massachusetts* v. *United States*, 435 U.S. 444, 461 (1978) (plurality opinion)). Here, there is a reasonable relationship between the condition imposed on the federal funds—insisting that those who

work for local agencies that receive substantial federal program funds do not engage in corruption—and the purpose of the condition—protecting the integrity of the administration of those federal programs. Cf. *New York* v. *United States*, 505 U.S. 144, 172-173 (1992) (finding a "reasonable relationship" between "milestones" required to be accomplished by States in disposal of radioactive waste and payments to States from surcharges on such waste, to be made only if States achieved those milestones). It was reasonable for Congress to insist that all personnel of agencies handling federal funds adhere to high standards of integrity, whether or not they are directly involved in implementing federal programs or disbursing federal funds.

In this case, of course, the law enforcement officials who engaged in corrupt activity "were in charge of carrying out the Federal program of housing and safekeeping the federal prisoners, including [the bribe-payor] Beltran, at Hidalgo County Jail." Pet. App. 15-16. Their corrupt activities thus undermined the very federal program for which federal monies were being paid to the local agency. But Congress could reasonably conclude that an agency with a problem of corrupt employees handling state or local affairs might also fail the requisite standard of integrity when implementing federal policies. Thus, Congress could reasonably insist that a local agency that receives significant federal assistance be free of corruption entirely.

This is not a case in which the conditions imposed on receipt of federal funds in Section 666 "pass the point at which pressure turns into compulsion." *Dole*, 483 U.S. at 211 (internal citation omitted). In this case, Hidalgo County was free to refuse the federal

financial assistance that it received in building the County Jail. Nor was the County compelled to enter into a contract to house federal prisoners. While presumably the County agreed to do so because it obtained a benefit in obtaining the federal *per diem* reimbursements, there is no indication that those benefits were anything more than a "relatively mild encouragement," *ibid.*, to cooperate with the federal government. Moreover, the agreements with the Marshals Service did not compel the County to alter any local policy with respect to public corruption in order to conform to federal requirements; bribery is contrary to the law of Texas as well as the United States. See Tex. Penal Code Ann. § 36.02(a) (West 1994). Accordingly, Section 666(a)(1)(B) does not exceed Congress's spending power.[6]

4. Finally, petitioner (Pet. Br. 13) and *amicus* NACDL (Br. 11-12) rely on the rule of lenity. That rule applies only in a case of statutory ambiguity, where the Court "can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 117 S. Ct. 921, 931 (1997) (internal quotation marks omitted). Here, the text of the statute is unqualified, and to the extent that the legislative history may be relevant, cf. *Gonzales*, 117 S. Ct. at 1035, that history discloses no basis for engrafting on Section 666 a requirement that the bribe must be shown to affect federal funds. Accordingly, "this is not a case of

[6] The Court has also noted that an exercise of the spending power may be invalid if it contravenes some "independent constitutional bar" such as the Eighth Amendment, see *Dole*, 483 U.S. at 210-211, but that consideration has no application to this case.

guesswork reaching out for lenity." *Wells*, 117 S. Ct. at 931.

B. Petitioner Was An Agent Of A Local Government Agency That Received More Than $10,000 In A Year Of Federal Program Benefits

Petitioner contends that two explicit elements of the offense under Section 666(a)(1)(B) were not satisfied. First, he argues (Pet. Br. 15-20) that the Hidalgo County Sheriff's Office did not receive $10,000 in annual "benefits" under a "Federal program" within the meaning of the statute, because the payments made by the United States Marshals Service to Hidalgo County for the housing of federal prisoners like Beltran were merely payments for services rendered, and not programmatic assistance. Second, he argues (Pet. Br. 20-23) that he was not an agent of local government because the Sheriff's Office for which he worked was not a local government agency. Neither of those arguments is fairly included within the questions on which this Court granted review, and neither is therefore properly before the Court. See *Yee* v. *City of Escondido*, 503 U.S. 519, 533 (1992).[7] Both contentions are in any event without merit.

1. Petitioner was unquestionably an agent of an agency of local government, the Hidalgo County Sheriff's Office. Although petitioner argues that the Sheriff's Office is not a local governmental agency because it is independent of the County, the evidence

[7] In particular, petitioner's contention that the federal funds were merely payments for services rendered is an attempt to argue the first question presented in the petition for a writ of certiorari, which this Court excluded from its grant of review. See Pet. i; J.A. 167.

at trial showed that Sheriff Marmolejo signed the contract to house federal prisoners on behalf of Hidalgo County. See J.A. 43, 45-46. Furthermore, Section 666 reaches all local governmental agencies of any kind; Section 666(d) defines a "government agency" to include "a subdivision of the executive, legislative, judicial, *or other branch of government*, including a department, *independent establishment*, commission, administration, authority, board, and bureau." 18 U.S.C. 666(d)(2) (emphasis added).

2. The Sheriff's Office received more than $10,000 under a "Federal program involving a grant, contract, * * * or other form of Federal assistance" during the relevant periods. The Cooperative Agreement Plan (CAP) (J.A. 31-40) provided for a federal grant to the County for construction at the Jail; that grant was conditioned on the County's agreement to house federal prisoners at the Jail in exchange for their costs (J.A. 35), which agreement was later memorialized in the Intergovernmental Service Agreement (IGA) signed by Sheriff Marmolejo (J.A. 41-52). Pursuant to the CAP and IGA, the federal government paid the Sheriff's Office about $70,000 per month for prisoner housing during the relevant period, an amount far exceeding the jurisdictional prerequisite of $10,000 in federal funding per year. See Tr. 1121-1122, 1126, 1137.

Petitioner argues that the federal payments for prisoner housing were not "[f]ederal assistance" because they were merely payments for commercial services rendered by the County Jail. He relies (Pet. Br. 18-19) on a statement in the legislative history of Section 666 to the effect that "not every federal contract or disbursement of funds would be covered" by Section 666. S. Rep. No. 225, at 370. The Senate

Report indicates, however, that disbursements of funds under federal contracts are covered by Section 666 as long as they are pursuant to a "[f]ederal program," which the Report explained to mean "that there must exist a specific statutory scheme authorizing the Federal assistance in order to promote or achieve certain policy objectives." *Ibid.* See *United States* v. *Rooney*, 986 F.2d 31, 35 (2d Cir. 1993) ("The inquiry is not whether there is a *quid pro quo*, but, rather, whether the funds disbursed can be considered Federal assistance within a specific statutory scheme intended to promote public policy objectives and not payment by the government as a commercial entity.").

In this case, there is a "specific statutory scheme" under which the CAP and IGA were entered into, and under which the Jail received the federal payments for housing federal prisoners. The CAP and IGA were executed under 18 U.S.C. 4002, which authorizes the Attorney General to enter into contracts with state and local authorities to arrange for "suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress." The CAP, which was "predicated upon the Federal government's requirement for detention space and services and the local government's provision of such services," provided for "Federal participation in the funding of local governmental jail construction, renovation or improvement programs." J.A. 32. In effect, the CAP and IGA were part of a federally funded jail construction and operation program, and although title to the County Jail remained in the hands of the local government, one of the major purposes of federal funding of the Jail was to provide space needed for the federal government's own inmates when their presence was required in the

area. Accordingly, under the terms of Section 666, the Sheriff's Office received, within the relevant periods, "benefits in excess of $10,000 under a Federal program involving a grant, contract, * * * or other form of Federal assistance."

II. THE RICO CONSPIRACY STATUTE, 18 U.S.C. 1962(d), DOES NOT REQUIRE THAT THE DEFENDANT AGREE PERSONALLY TO COMMIT ANY PREDICATE ACTS OF RACKETEERING

The Racketeer Influenced and Corrupt Organizations Act (RICO) makes it a crime to conduct, or participate in the conduct of, the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. 1962(c). A "pattern of racketeering activity" requires "at least two acts of racketeering activity" within a ten-year period. 18 U.S.C. 1961(5). "[R]acketeering activity" covers various offenses, including state felony offenses involving bribery. 18 U.S.C. 1961(1). The RICO statute also punishes, as a separate crime, conspiring to conduct the affairs of an enterprise through a pattern of racketeering activity. 18 U.S.C. 1962(d).

In this case, petitioner and his co-conspirators were charged with conspiring to conduct the affairs of the Hidalgo County Sheriff's Office (the enterprise) through two or more acts of bribery, constituting a pattern of racketeering activity. See J.A. 89. The conspiracy count did not charge that any of the four conspirators agreed *personally* to commit two racketeering acts; rather, it alleged (and the jury found) that petitioner agreed "that two or more acts of racketeering activity * * * would be committed in the conduct of the affairs of the enterprise." *Ibid.*

Petitioner contends that, to be guilty of RICO conspiracy, a defendant must agree to engage in the pattern of racketeering personally, and that it is not sufficient that he agree to the commission of the predicate acts by a member of the conspiracy. That proposed rule is contrary to traditional principles of conspiracy law, and there is no indication in the RICO statute that Congress intended to impose such a novel and strict requirement of proof in order to convict RICO conspirators.

1. "A conspiracy is a partnership in crime." *Pinkerton* v. *United States*, 328 U.S. 640, 644 (1946). "The gist of the crime of conspiracy * * * is the agreement or confederation of the conspirators to commit one or more unlawful acts." *Braverman* v. *United States*, 317 U.S. 49, 53 (1942) (discussing predecessor to 18 U.S.C. 371). Under traditional principles of conspiracy law, there is no requirement that any of the conspirators agree personally to commit the substantive offense that is the objective of the confederation; unless the particular conspiracy statute requires the commission of an overt act in furtherance of the conspiracy, all the government must show to prove conspiracy is that the defendant entered into an agreement with the objective of violating one or more criminal statutes. See *United States* v. *Shabani*, 513 U.S. 10, 13-14 (1994); *Braverman*, 317 U.S. at 53; *United States* v. *Holte*, 236 U.S. 140, 144 (1915).

The absence of any requirement that a conspirator agree *personally* to the commission of a substantive offense stems from the fundamental point that "a conspiracy to commit a crime is a different offense from the crime that is the object of the conspiracy." *United States* v. *Rabinowich*, 238 U.S. 78, 85 (1915).

Entering into a conspiracy is prohibited by law, not merely because the conspirator has a desire or intent that the law be violated, but because (among other reasons), by entering into the arrangement to commit a crime, the conspirator creates a greater danger that the crime will in fact be committed *by someone*. See *Callanan* v. *United States*, 364 U.S. 587, 593 (1961). In a conspiracy, "so long as the partnership in crime continues, the partners act for each other in carrying it forward." *Pinkerton*, 328 U.S. at 646. Thus, one may be guilty of conspiracy to commit an offense even if he is *incapable* of committing the substantive offense. *Rabinowich*, 238 U.S. at 86; see *Holte*, 236 U.S. at 144-145.

Nor is it necessary, for a conspiracy conviction, that the conspirators have identified and come to agreement on the precise details of their criminal objectives. As Judge Learned Hand cogently explained, "a party to a conspiracy need not know the identity, or even the number, of his confederates; when he embarks upon a criminal venture of indefinite outline, he takes his chances as to its content and membership, so be it that they fall within the common purposes as he understands them." *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944); see also *Johnson* v. *United States*, 62 F.2d 32, 33 (9th Cir. 1932). "The fact that the defendants may not have known all the particulars of the total scope of a conspiracy does not bar a conviction." *United States* v. *Bastone*, 526 F.2d 971, 981 (2d Cir. 1975), cert. denied, 425 U.S. 973 (1976); see also *Jones* v. *City of Chicago*, 856 F.2d 985, 992 (7th Cir. 1988) (Posner, J.) ("It is enough if you understand the general objectives of the scheme, accept them, and agree, either

explicitly or implicitly, to do your part to further them.").

Accordingly, one who agrees to assist in accomplishing the essential objective of an illegal scheme is guilty of conspiracy, whether or not he agrees personally to commit the substantive offense that is the object. See *Pinkerton*, 328 U.S. at 645-647; *Blue* v. *United States*, 138 F.2d 351, 360 (6th Cir. 1943), cert. denied, 322 U.S. 736 (1944).[8] In keeping with that rule, this Court has upheld conspiracy convictions as supported by sufficient evidence, even though the defendant did not participate directly in the commission of the object offense and was not charged with agreeing to do so. In *Direct Sales Co.* v. *United States*, 319 U.S. 703 (1943), the Court upheld the conspiracy conviction of a drug wholesaler who supplied drugs to a physician with knowledge that the physician was distributing them unlawfully, even though the wholesaler did not personally violate the substantive law; the Court regarded it as sufficient that the wholesaler intended to further the physician's criminal objective. *Id.* at 713. In *Rabinowich*, the

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[8] That principle is related to the principle that conspirators may be punished for any reasonably foreseeable substantive offense committed by their co-conspirators in furtherance of the conspiracy's objective. *Pinkerton*, 328 U.S. at 647. The rule that conspirators are accountable for each other's acts in furtherance of the conspiracy was recognized at common law. See, *e.g.*, *Collins* v. *Commonwealth*, 3 Serg. & Rawle 220, 223, 226 (Pa. 1817); *Commonwealth* v. *Warren*, 6 Mass. 74 (1809); B.F. Pollack, *Common Law Conspiracy*, 35 Geo. L.J. 328, 334 (1947). That principle also serves as the theoretical foundation for Federal Rule of Evidence 801(d)(2)(E), which makes the statement of one conspirator during and in furtherance of the conspiracy admissible against all his co-conspirators. See Fed. R. Evid. 801(d)(2)(E) advisory committee's note.

Court recognized that a conspiracy defendant need not have agreed to commit the object offense himself when it observed that "an averment [in the indictment] that [certain defendants] were parties to the conspiracy [was] by no means equivalent to an averment that they were to participate in the substantive offense." 238 U.S. at 87.

The same rule was recognized as firmly established in the American Law Institute's 1962 *Model Penal Code*, which stated that a person is guilty of conspiracy with another person or persons to commit a crime if he "agrees with such other person or persons that they or one or more of them will engage in conduct that constitutes such crime." *Model Penal Code and Commentaries*, Pt. I, § 5.03(1)(a) (1985). As the reporters of the *Model Penal Code* explained in their commentary:

> The Draft, accordingly, rests on the primordial conception of agreement as the core of the conspiracy idea. It should be emphasized, however, that so long as the purpose of the agreement is to facilitate the commission of a crime, the actor need not agree "to commit" the crime, as the statutory formulations put it. It is enough that he agree to aid in its planning or commission, thus comprehending accessorial participation if the requisite consensus is involved.

Model Penal Code, Tent. Draft No. 10, at 117 (1960); see also *Model Penal Code and Commentaries*, *supra*, at 421.

2. The RICO conspiracy provision, 18 U.S.C. 1962(d), provides that "[i]t shall be unlawful for any person to conspire to violate" the substantive RICO provisions, including Section 1962(c). Section 1962(d)

should be construed in accordance with the firmly established principles of conspiracy jurisprudence discussed above. This Court has recognized that, absent contrary indications, Congress intends to adopt the common law definition of statutory terms that have a well-settled common law meaning. See *Molzof* v. *United States*, 502 U.S. 301, 307-308 (1992). For example, in *Shabani*, the Court relied on "the common law understanding of conspiracy," which does not contain an overt act requirement, in holding that the drug conspiracy statute, 21 U.S.C. 846, also does not contain such a requirement. See 513 U.S. at 13-14.

Nothing in the text of the RICO conspiracy provision suggests that Congress intended to depart from the long-standing doctrine that conspirators need only agree and intend that a substantive provision be violated, not that each conspirator agree to commit the violation personally. Section 1962(d) prohibits anyone from "conspir[ing] to violate" RICO. That language does not suggest, as petitioner contends, that the conspirator must agree to violate RICO himself. A similar argument was rejected in *Holte*, where the Court construed the predecessor to 18 U.S.C. 371, which punished any person or persons who conspire "to commit any offense against the United States." The Court declined to read that language to mean "an offense that all the conspirators should commit," and concluded rather that the words used "mean to adopt the common law as to conspiracy and that 'commit' means no more than bring about." *Holte*, 236 U.S. at 144. Similarly, the RICO statute's punishment of those who "conspire to violate" RICO means that those who agree that a RICO violation shall be committed violate its conspiracy provision.

Thus, a RICO conspiracy offense is established if there is an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity, which includes the agreement that the conspirators, as a group, will commit two or more racketeering acts constituting such a pattern.[9]

Petitioner's reading of Section 1962(d) to require proof of an agreement to commit personally two predicate acts of racketeering would require "a degree of involvement in the affairs of the conspiracy that is not required in any other type of conspiracy, where agreeing to a prescribed objective is sufficient." *United States* v. *Neapolitan*, 791 F.2d 489, 498 (7th Cir.), cert. denied, 479 U.S. 939, 940 (1986). Petitioner's argument would require this Court to conclude that Congress, in enacting Section 1962(d), had created a wholly "new form" of conspiracy at odds with traditional conspiracy doctrine. *Id.* at 497. There is no basis in the language or history of the statute to suggest that Congress had such an intention. Instead of creating a new law of conspiracy, RICO merely created a new objective for traditional

[9] There is therefore no merit to the argument of *amicus* NACDL (Br. 10-11) that a conspirator's agreement to conduct the affairs of an enterprise through a pattern of racketeering activity, in violation of RICO, means an agreement to conduct such affairs *personally*. NACDL starts from the premise that, even under the common law, "a conspiracy requires[] the individual's agreement to violate the substantive offense." Br. 10. But as we have explained, a conspiracy as traditionally understood does not require the individual's agreement to violate the offense *personally*, but rather his joining a group that collectively agrees and intends to violate the substantive offense.

conspiracy law—a violation of Section 1962(a), (b), or (c). *Ibid.*

Petitioner suggests (Pet. Br. 27-28) that Congress, in enacting RICO, intended to incorporate a rule adopted in a sentencing provision of the same omnibus anti-crime legislation, which directed enhanced sentencing for a dangerous special offender who committed a felony in furtherance of a conspiracy to engage in a pattern of criminal conduct, and who did, or agreed that he would, manage or supervise the affairs of the conspiracy. See 18 U.S.C. 3575(e)(3) (1970) (repealed). From that sentencing provision, petitioner argues that Congress, in the RICO conspiracy provision, also adopted a rule that the defendant must have intended personally to conduct the affairs of the racketeering enterprise through a pattern of racketeering activity. The former Section 3575(e)(3), however, is irrelevant to the issue before the Court in this case. The Court has in the past looked to that sentencing provision to inform RICO's definition of a "pattern" of racketeering activity, since the special-offender provision specifically defined the term "pattern" to require that criminal acts be related to one another. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 496 n.14 (1985); *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239-240 (1989). But see *H.J.*, 492 U.S. at 240 (noting that special-offender provision was "of no assistance" in explaining pattern element requiring *continuing* racketeering activity, because it did not address continuity). "Pattern," however, is a term without a settled common law meaning. This case concerns the meaning of "conspire," and that word had an extensive judicial gloss when Congress enacted RICO. There is no indication in the omnibus 1970 crime legislation

that Congress intended the courts to look anywhere other than well-settled principles of conspiracy law in giving meaning to that term.

3. *Amicus* NACDL argues (Br. 18-23) that a rule requiring proof of the defendant's agreement to commit the predicate acts personally is necessary to preserve requirements of the substantive RICO offense defined in Section 1962(c)—such as the requirement that the predicate acts of racketeering constitute a "pattern," the requirement that an entity identifiable as an "enterprise" be present, and the element that a defendant must "conduct or participate, directly or indirectly, in the conduct" of the enterprise. That argument is without merit. A conspiracy to violate RICO requires more than an agreement that two acts of racketeering will be committed; the conspiracy must involve an agreement among the conspirators to conduct the affairs of an enterprise through a pattern of racketeering activity. See *Neapolitan*, 791 F.2d at 496 n.3. Thus, although the conspirators may not, at the time of their agreement, foresee all of the opportunities for criminal activity that will eventually cross their path, they must anticipate that the criminal association will "function as a continuing unit," thus constituting an enterprise (see *United States* v. *Turkette*, 452 U.S. 576, 583 (1981)), that the criminal acts will be related, thus constituting a pattern (see *H.J.*, 492 U.S. at 239), and that at least one among them will manage or operate the enterprise (see *Reves* v. *Ernst & Young*, 507 U.S. 170, 179 (1993)). Those elements of the unlawful agreement eliminate any danger that a RICO

conspiracy defendant will be convicted merely on the basis of "guilt by association" (see NACDL Br. 22).[10]

A personal-commission rule would, in fact, undermine the goals of conspiracy law generally and the RICO statute in particular. First, traditional principles of conspiracy law permit authorities to intervene when the criminal agreement is formed, even when "the object dimension * * * [is still] of indeterminate scope." See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 919, 930 (1959). Assume, for example, that a group of people agree to set up an arson-for-hire ring to take advantage of future criminal opportunities, but that they are discovered before any definitive plans to carry out acts of arson materialize. Or assume that a group of corrupt probate judges, court clerks, and estate lawyers agree to use in the future the judges' power to appoint personal representatives in return for kickbacks and bribes, but that the conspirators are discovered early, before any opportunities to engage in their corruption arise, and that not every member of the conspiracy is in a position either to give or to receive bribes. In both cases, the confederates have conspired among themselves to conduct the affairs of an enterprise through a pattern of racketeering activity, even if

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[10] It is therefore irrelevant to this case that petitioner was acquitted on one of the two predicate acts of racketeering with which he was charged, and was therefore acquitted on the substantive count of racketeering. J.A. 143. Because the jury necessarily found that petitioner agreed to the conduct of the affairs of the overall enterprise, the Hidalgo County Sheriff's Office, through a pattern of bribes, he was properly convicted of conspiracy, even though he was found to have *personally* committed only one act of racketeering, bribery involving the acceptance of two Rado watches from Beltran. See J.A. 57.

they have not assigned definite roles in the enterprise to every member of the conspiracy, and even if some roles do not necessarily involve the personal commission of racketeering acts. Each case, like that of "'Murder Incorporated[,]' would be a group contemplating the commission of other than a definite number of crimes" (*ibid.*) and would be punishable as a conspiracy.

Often, the government will not know which member or members of a RICO conspiracy intends actually to commit the object offense until the offense has been committed; indeed, the conspirators themselves might not decide until long after their initial agreement how precisely they will go about achieving their criminal goal. Requiring the government to show not merely that the defendant entered into an agreement having a criminal object, but also that he personally agreed to commit the object offense, would in many cases defeat a principal purpose of the conspiracy concept (both in RICO and elsewhere)—to enable the government to intervene before the illegal acts intended by a criminal collaboration actually occur. See *United States* v. *Feola*, 420 U.S. 671, 694 (1975); *Rabinowich*, 238 U.S. at 88; *Developments in the Law—Criminal Conspiracy*, *supra*, 72 Harv. L. Rev. at 924 ("When the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached at an earlier stage. In this situation the reasons for which the law is reluctant to intervene are considerably weaker."); *Model Penal Code and Commentaries*, *supra*, at 388 (conspiracy law properly permits "preventive intervention by the agencies of law enforcement").

Second, adherence to traditional conspiracy doctrine furthers Congress's major purpose in enacting

RICO, the eradication of organized crime. *H.J.*, 492 U.S. at 245. A requirement that each member of a RICO conspiracy agree to commit personally the requisite predicate acts would undermine the congressional objective of combatting organized crime because it would have the effect of exempting from coverage those organized crime figures shrewd enough to insulate themselves from the criminal acts committed by their underlings. As two scholars in the field of organized crime have observed:

> The reason why most of the top leaders [of the Cosa Nostra] are able to live and flourish without going to jail is because they are carefully insulated from contact with crime. That is, insulated from those criminals who get their hands dirty. Many of the criminal brass could take, and pass, a lie detector test during which they could deny having touched or seen a deck of heroin, been in a bookie joint, or [having] known any loansharks, extortionists or murderers in years.

R. Salerno & J. Tompkins, *The Crime Federation: Cosa Nostra and Allied Operations in Organized Crime* 156 (1969) (*quoted in* J. Minnis, Comment, *Clarifying RICO's Conspiracy Provision: Personal Commitment Not Required*, 62 Tul. L. Rev. 1399, 1412 n.80 (1988)); see also Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, *Organized Crime and Illicit Traffic in Narcotics*, S. Rep. No. 72, 89th Cong., 1st Sess. 2 (1965) (convicting crime chieftains is "usually extremely difficult and sometimes is impossible, simply because the top-ranking criminal has taken the

utmost care to insulate himself from any apparent physical connection with the crime").[11]

Congress reinforced the sweep of the RICO statute by expressly directing that "[t]he provisions of this Title [Title IX of the Organized Crime Control Act of 1970] shall be liberally construed to effectuate its remedial purposes." Pub. L. No. 91-452, § 904(a), 84 Stat. 947 (18 U.S.C. 1961 note). In light of the statute's purpose to eradicate organized crime, Congress's "self-consciously expansive language and overall approach," *Sedima*, 473 U.S. at 498, and the congressional directive to construe the statute liberally, there is no basis for narrowing Section 1962(d) by imposing a personal-commission requirement that is foreign to traditional conspiracy law. RICO's liberal-construction clause "seeks to ensure that Congress' intent is not frustrated by an overly narrow reading of the statute." *Reves*, 507 U.S. at 183. Petitioner's construction, by insulating some of

[11] Two pre-RICO cases—*People* v. *Luciano*, 14 N.E.2d 433 (N.Y. 1938), and *United States* v. *Aviles*, 274 F.2d 179 (2d Cir.), cert. denied, 362 U.S. 974, 982 (1960)—illustrate the operating style of many organized-crime chieftains. In describing a large-scale prostitution ring run by Charles "Lucky" Luciano, the head of the New York syndicate in the late 1930s, the *Luciano* opinion noted that Luciano himself "did not take an active part in the daily operations of the business." 14 N.E.2d at 434. In *Aviles*, the court of appeals affirmed the narcotics conspiracy conviction of Luciano's successor, Vito Genovese, explaining: "Although there is no proof that Vito Genovese ever himself handled narcotics or received any money, it is clear from what he said and from his presence at meetings of the conspirators and places where they met and congregated that he had a real interest and concern in the success of the conspiracy." 274 F.2d at 188.

those who occupy the highest rungs of organized crime, would have that unjustified effect.

4. Petitioner and *amicus* NACDL make a number of additional arguments in favor of reversal here, all of which are without merit. First, petitioner argues that the government conceded in the district court that he could be convicted only if he were shown to have agreed personally to commit two acts of racketeering, and that this case was tried against him under that theory. Pet. Br. 28-29. The prosecutor explained to the district court, however, that, "[i]f he [petitioner] generally knows what's going on, he knows that these [racketeering acts] are happening, then he would be liable." Tr. 1290-1291. The prosecutor also agreed with the court's statement that "[the defendant] doesn't necessarily have to know about every particular act as long he's in the relationship," by responding, "Yes, sir. That he has knowledge that it's going on. * * * A pattern that's occurring and that he's willing and able to participate. He assists by being available." Tr. 1291. The district court clearly ruled that the government did not have to prove that petitioner agreed to commit two acts of racketeering personally and instructed the jury on that basis in accordance with that ruling, see J.A. 154-155, and the government defended that ruling and instruction in the court of appeals, see Gov't C.A. Br. 43-47.[12]

[12] Petitioner also argues (Pet. Br. 31-32) that the RICO instructions given here would not have been valid in the Eleventh Circuit, which arguably requires, in a "single objective" RICO case, that the defendant have agreed to commit two racketeering acts personally. Whether or not petitioner might have prevailed on appeal had his case been brought in the Eleventh Circuit, the correct rule, in our view, is that, in every RICO conspiracy case, the defendant need only have

Second, petitioner suggests (Pet. Br. 36) that application of the RICO statute to state and local government officials is contrary to *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *McNally* v. *United States*, 483 U.S. 350 (1987), which he reads as requiring a clear statement of congressional purpose to subject state governmental entities to federal law. That claim was not presented in the petition for a writ of certiorari and is not "fairly included" within the RICO question on which review was granted, which is limited to the personal-commission issue. Accordingly, the Court should not reach the issue. See *Yee* v. *City of Escondido*, 503 U.S. at 533. In any event, this case is unlike *Gregory* or *McNally*, for this case involves a federal prosecution of a conspiracy to commit predicate acts that are felonies, not federal preemption of state policymaking authority in matters such as "disclosure and good government for local and state officials" (*McNally*, 483 U.S. at 360). Furthermore, it is well settled that a state governmental entity may be an "enterprise" within the meaning of RICO. See *United States* v. *Angelilli*, 660 F.2d 23, 31 (2d Cir. 1981), cert. denied, 455 U.S. 910, 945 (1982); *United States* v. *Thompson*, 685 F.2d 993 (6th Cir.) (en banc), cert. denied, 459 U.S. 1072 (1982). An enterprise

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agreed to the commission of racketeering acts by members of the conspiracy, not necessarily himself. The Eleventh Circuit's distinction of single-objective and multiple-objective RICO cases in *United States* v. *Carter*, 721 F.2d 1514 (11th Cir.), cert. denied, 469 U.S. 819 (1984), appears to have been based on an effort to reconcile its own RICO conspiracy precedents, a task that this Court need not undertake. The Eleventh Circuit's treatment of that point in *Carter* was thoroughly and convincingly criticized by the Seventh Circuit in *Neapolitan*, 791 F.2d at 499 n.5.

under RICO may be "any entity"—in other words, "anything that exists," including a state agency. *Angelilli*, 660 F.2d at 31.

Finally, petitioner argues that the racketeering acts charged in the RICO conspiracy count—state bribery offenses—are not predicate offenses because they are not punishable by more than one year's imprisonment under Texas law. Pet. Br. 37-40. That argument, too, was not presented in the certiorari petition and is not properly before the Court. In any event, the court of appeals properly rejected the contention. Pet. App. 19-20. The predicate state-law offense of bribery, Tex. Penal Code Ann. § 36.02(a) (West 1994), is not superseded by the misdemeanor gratuity offense, *id.* § 36.08(b), in cases like this one, involving a bribe given as a *quid pro quo* for a benefit, since the misdemeanor offense does not contain the element of *quid pro quo*. Pet. App. 20; *Cerda* v. *State*, 750 S.W.2d 925, 927 (Tex. Ct. App. 1988). Section 36.02(a) does not contain any element that the person offering a bribe must be in custody, and petitioner was a "public servant" covered by the plain language of the prohibitions of Section 36.02(a), since he was "selected" or "appointed" as an "agent of government." Accordingly, petitioner was properly convicted of RICO conspiracy.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. Section 666 of Title 18, United States Code, provides:

Theft or bribery concerning programs receiving Federal funds

(a) Whoever, if the circumstance described in subsection (b) of this section exists—

(1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—

(A) embezzles, steals, obtains by fraud, or otherwise without authority knowingly converts to the use of any person other than the rightful owner or intentionally misapplies, property that—

(i) is valued at $5,000 or more, and

(ii) is owned by, or is under the care, custody, or control of such organization, government, or agency; or

(B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more; or

(2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to

influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more;

shall be fined under this title, imprisoned not more than 10 years, or both.

(b) The circumstance referred to in subsection (a) of this section is that the organization, government, or agency receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance.

(c) This section does not apply to bona fide salary, wages, fees, or other compensation paid, or expenses paid or reimbursed, in the usual course of business.

(d) As used in this section—

(1) the term "agent" means a person authorized to act on behalf of another person or a government and, in the case of an organization or government, includes a servant or employee, and a partner, director, officer, manager, and representative;

(2) the term "government agency" means a subdivision of the executive, legislative, judicial, or other branch of government, including a department, independent establishment, commission, administration, authority, board, and bureau, and a corporation or other legal entity established, and subject to control, by a government or govern-

ments for the execution of a governmental or intergovernmental program;

(3) the term "local" means of or pertaining to a political subdivision within a State;

(4) the term "State" includes a State of the United States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(5) the term "in any one-year period" means a continuous period that commences no earlier than twelve months before the commission of the offense or that ends no later than twelve months after the commission of the offense. Such period may include time both before and after the commission of the offense.

2. Section 1961 of Title 18, United States Code, provides:

Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from

interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), sections 2251, 2251A, 2252, and 2258 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2321 (relating to trafficking in certain motor vehicles

or motor vehicle parts), sections 2341-2346 (relating to trafficking in contraband cigarettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of that title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, or (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political subdivision, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (ex-

cluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in viclation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and charged with the duty of enforcing or carrying into effect this chapter;

(8) "racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, the Associate Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the

Department of Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in investigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

3. Section 1962 of Title 18, United States Code, provides:

Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either

in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

4. Section 4002 of Title 18, United States Code, provides:

Federal prisoners in State institutions; employment

For the purpose of providing suitable quarters for the safekeeping, care, and subsistence of all persons held under authority of any enactment of Congress, the Attorney General may contract, for a period not exceeding three years, with the proper authorities of any State, Territory, or political subdivision thereof, for the imprisonment, subsistence, care, and proper employment of such persons.

Such Federal prisoners shall be employed only in the manufacture of articles for, the production of supplies for, the construction of public works for, and

the maintenance and care of the institutions of, the State or political subdivision in which they are imprisoned.

The rates to be paid for the care and custody of said persons shall take into consideration the character of the quarters furnished, sanitary conditions, and quality of subsistence and may be such as will permit and encourage the proper authorities to provide reasonably decent, sanitary, and healthful quarters and subsistence for such persons.

No. 96-738

(5)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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OCTOBER TERM 1996

No. 96-738

MARIO SALINAS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* *

The National Association of Criminal Defense Lawyers (NACDL) is a District of Columbia non-profit corporation with a membership of more than 9,000 attorneys and 28,000 affiliate members, including representatives from all fifty states. The American Bar Association recognizes the NACDL as an

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* Letters from the parties consenting to the filing of this brief are on file with the Clerk of this Court.

affiliate organization and awards it full representation in its House of Delegates.

The NACDL was founded in 1958 to promote study and research in the field of criminal defense law; to disseminate and advance knowledge of the law in the area of criminal practice; and to encourage the integrity, independence and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among the NACDL's stated objectives is the promotion of the proper administration of criminal justice, and to ensure that statutes are construed and applied consistent with their language, and in accordance with due process.

STATEMENT

Amicus adopts petitioner's statement of the case.

SUMMARY OF ARGUMENT

The court below erred in affirming petitioner Salinas's convictions under the Racketeer Influenced and Corrupt Organizations act ("RICO"), 18 U.S.C. §1962(d), and under 18 U.S.C. §666. Regarding the RICO conviction, as has been the case with many issues involving RICO, the question of what constitutes a "RICO conspiracy" has bedeviled the courts, and created a conflict among the Circuit Courts of Appeal.

Indeed, even the government, in a prior case, argued for precisely the standard petitioner seeks now, and a Department of Justice RICO Manual instructed that indictments be so drafted. Also, the Fifth Circuit itself has issued contradictory standards through the years with respect to the requirements of

a RICO conspiracy, and two Justices of this Court dissented from the denial of a petition for certiorari submitted in another case (from the Third Circuit) twelve years ago.

As detailed below, the Fifth Circuit's decision that a RICO conspiracy does not require an agreement by the defendant at issue to commit personally at least two predicate acts of racketeering, but only an agreement that predicate acts be committed by others, was fatally flawed in three respects:

(1) it sustained a jury instruction that did not even require the relaxed standard adopted by the court below. While even the court below requires an *agreement* that predicate acts be committed, albeit not by the defendant under consideration, the instruction at trial below permitted the jury to convict petitioner if he simply *knew* of the predicate acts committed by others. That cannot provide the basis for a RICO conspiracy conviction, even under the standard applied by the court below;

(2) it failed to apply the elements of the substantive offense, §1962(c), to the agreement to commit the offense. An essential element of a violation of §1962(c) is the defendant's personal commission of (at least) two predicate acts of racketeering; therefore; an agreement to violate §1962(c) necessarily requires an agreement to commit the substantive offense -- namely, an agreement to commit *personally* two such acts of racketeering. As a result, the standard adopted by the court below is completely inconsistent with the structure and elements of the RICO statute; and

(3) it ignored and undermined a series of decisions by this Court with respect to the conduct and persons punishable under the RICO statute. Those decisions, discussed below, have construed the elements of RICO — the "racketeering enterprise", the "pattern of racketeering", and the "operation or management" test — so as to ensure that persons who do not commit a "pattern of racketeering", or who do not have a sufficient relationship with the affairs of the "enterprise" are not liable under RICO. The decision below would vitiate many of the principles underlying those decisions, and allow prosecutors and plaintiffs to circumvent them at will.

Regarding, the convictions under 18 U.S.C. §666, which proscribes the bribery of state and local officials in amounts greater than $5,000, when the state or local government organization receives more than $10,000 of federal funding annually, the Court below applied the statute to circumstances in which federal funds were not at all implicated, thereby extending the statute beyond its appropriate and intended scope. In addition, to the extent the statute *does* apply to such facts, it is unconstitutional since it violates fundamental principles of federalism protected by the Tenth Amendment to the United States Constitution.

Accordingly, *amicus* respectfully submits that the decision below should be reversed with respect to both the RICO conviction and the §666 conviction, and the Indictment against petitioner be dismissed.

ARGUMENT

I. THE COURT BELOW ERRED IN HOLDING THAT A CONSPIRACY TO VIOLATE RICO DOES NOT REQUIRE PROOF THAT A DEFENDANT AGREED TO COMMIT PERSONALLY TWO PREDICATE ACTS OF RACKETEERING

The conflict among the Circuit Courts of Appeal is simple and stark: does a conspiracy to violate subsection 1962(c) of RICO require that a defendant agree to commit *personally* two predicate acts of racketeering, as the First, Second, and Tenth Circuits have held? *See United States v. Sanders*, 929 F.2d 1466, 1473 (10th Cir.), *cert. denied*, 502 U.S. 846 (1991); *United States v. Ruggiero*, 726 F.2d 913, 921 (2d Cir.), *cert. denied sub nom. Rabito v. United States*, 469 U.S. 831 (1984); *United States v. Winter*, 663 F.2d 1120, 1136-38 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011 (1983). *See also Dooley v. United Technologies Corp.*, 803 F. Supp. 428, 440 (D.D.C. 1992).

Or, as other Circuits have held, does a RICO conspiracy require only that the particular defendant merely agree that two predicate acts be committed by other members of the "racketeering enterprise"? *See, e.g., United States v. Pungitore*, 910 F.2d 1084, 1130 (3d Cir. 1990), *cert. denied*, 500 U.S. 915 (1991); *United States v. Pryba*, 900 F.2d 748, 759-60 (4th Cir. 1989), *cert. denied*, 498 U.S. 924 (1990); *United States v. Sutherland*, 656 F.2d 1181 (5th Cir. 1981), *cert. denied*, 455 U.S. 949 (1982); *United States v. Neapolitan*, 791 F.2d 489, 494-500 (7th Cir.), *cert. denied*, 479 U.S. 939 (1986); *United States v. Leisure*, 844 F.2d 1347, 1367 (8th Cir. 1988); *United*

States v. Blinder, 10 F.3d 1468, 1477 (9th Cir. 1993).[1]

Ironically, as the Seventh Circuit noted in *United States v. Neapolitan*, *supra*, both sides of the issue "have ground their interpretations" on the same case: *United States v. Elliott*, 571 F.2d 880, 902-03 (5th Cir.), *cert. denied*, 439 U.S. 953 (1978). 791 F.2d at 496, n. 3. According to *Neapolitan*, *Elliott* "is at once the seminal discussion of RICO conspiracy and, in many ways, the root of the current controversy." *Id.*

As detailed below, only by ignoring specific language in *Elliott* and subsequent cases have several Circuits dispensed with the RICO conspiracy's requirement of the defendant's agreement to commit personally two predicate acts of racketeering. The result, as demonstrated below, is that those decisions have been inconsistent internally and with each other, and that is particularly true for the Fifth Circuit.

As a result, examination of the elements of a violation of §1962(c), as well as review of a series of this Court's decisions interpreting RICO and its several elements, compel

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[1] This conflict has been brewing for years and, in *Adams v. United States*, 474 U.S. 971 (1985), Justice White, joined by Chief Justice Burger, dissented from the denial of certiorari with respect to this very issue, noting that either "Congress' intent is being frustrated in those circuits which adhere to the narrower view of RICO conspiracy[,]" or "defendants are being exposed to conviction for behavior Congress did not intend to reach under §1962(d)." *Id.* *Amicus* respectfully submits that the latter is accurate. Thus, while, as discussed *post*, at 6-7, petitioner's conviction should be reversed under even the Fifth Circuit's standard, it is respectfully submitted that this Court should resolve this important conflict among the Circuits.

the conclusion that the proper construction of the RICO conspiracy section, §1962(d), requires that a defendant agree to commit personally at least two predicate acts.

A. The RICO Conspiracy Jury Instruction Below Was Erroneous Even Under the Fifth Circuit's Standard

As a threshold matter, though, petitioner's RICO conspiracy conviction cannot be sustained even under the standard applied below. The trial court's instruction to the jury allowed the jury to convict petitioner if he merely *knew* of the racketeering acts committed by others, regardless whether he agreed to their commission beforehand.

The pertinent portion of the charge read as follows:

> [w]hat you are being asked to decide in [the RICO conspiracy count] is . . . if [petitioner] was only involved in one or two [predicate acts of racketeering] or even none, did he, nevertheless, *know about this pattern. Did he know that this whole pattern of activity was going on and did he then* knowingly and wilfully join in and participate and contribute in some fashion.

United States v. Marmolejo, 89 F.3d 1185, 1195, n. 16 (5th Cir. 1996) (emphasis added).

Thus, the trial court's instruction, in permitting the jury to convict absent *any* agreement by the defendant with respect

to predicate acts, was contrary to either construction of the RICO statute, which each require *some* form of prior *agreement* with respect to the predicate acts. Mere *knowledge* is insufficient under either standard, yet that may very well be the (improper) basis for petitioner's RICO conviction.

As a result, at a minimum, it is respectfully submitted that petitioner's RICO conviction should be reversed, and a new trial ordered. However, as detailed below, the further relief of reversal and dismissal are mandated by the elements of §§1962(c) & (d), and by this Court's decisions applying RICO.

B. The Pertinent Sections of RICO

There are four subsections of RICO that are critical to the process of deciding what is required for a RICO conspiracy to violate §1962(c). That subsection provides:

> [i]t shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

Subsection 1962(d) states simply that:

> [i]t shall be unlawful for any person to conspire to violate any of the provisions of subsection

> (a), (b), or (c) of this section.

The "pattern of racketeering activity" referred to in §1962(c) is defined in pertinent part in §1961(5) as "requir[ing] at least two acts of racketeering activity," which activity is listed among the federal and state offenses set forth generically and specifically in §1961(1). The "enterprise" referred to in §1962(c) includes, under §1961(4), "any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity."

This Court has held that both the "pattern of racketeering" and the RICO "enterprise" are essential elements of the statute, and that they are distinct elements as well that must be proved independently. *See Sedima, S.P.R.L. v. Imrex Company, Inc.*, 473 U.S. 479, 496 (1985); *United States v. Turkette*, 452 U.S. 576, 583 (1981).

C. Since a §1962(c) Violation Requires the Personal Commission of Two Predicate Acts of Racketeering, a RICO Conspiracy Requires An Agreement to Commit Personally Two Such Predicate Acts of Racketeering

The stated basis for the decision below (and for those courts it follows, *see, e.g.*, cases cited *ante* at 5-6), that a RICO conspiracy does not require the defendant to agree to commit personally two predicate acts, is that "[n]othing in this language [of §1962(d)] indicates that Congress intended to do anything more than to criminalize a conspiratorial objective — the violation of a substantive RICO provision." *United States v. Marmolejo, supra*, 89 F.3d at 1196 (citations omitted), *citing United States v. Sutherland, 656 F.2d at 1193; Neapolitan, supra*, 791 F.2d at 497.

Yet, as detailed below, since that very "violation of a substantive RICO provision[,]" requires the *personal* commission of at least two predicate acts, the "conspiratorial objective" must include an agreement to do just that. In fact, the Seventh Circuit, in *United States v. Neapolitan*, *supra*, states that very proposition in a footnote, albeit without recognizing its controlling import:

> [s]ince the predicate crimes would have to be linked to the enterprise to fall within the scope of the conspiracy's objective, requiring an agreement personally to commit those crimes would amount to a requirement of agreeing personally to commit a violation of a substantive RICO provision.

791 F.2d at 498, n. 4.

That is exactly what a conspiracy requires: the individual's agreement to violate the substantive offense. The hallmark of a conspiracy is the agreement to accomplish an illegal objective. *See Braverman v. United States*, 317 U.S. 99 (1942). It is uncontested that a violation of §1962(c) requires that a defendant "conduct or participate, directly or indirectly, in the conduct of [the RICO] enterprise's affairs through" the *personal* commission of at least two predicate acts of racketeering activity constituting a "pattern." *See* Sand, Siffert, Loughlin, and Reiss, *Modern Federal Jury Instructions*, Volume 3 (1996), at ¶ 52.04, Instruction 52-25 ("[a] defendant engages in a pattern of racketeering activity if he commits at least two racketeering acts, sufficiently related to constitute a pattern, within ten years of each other"). *See also United States*

v. Phillips, 664 F.2d 971, 1038 (5th Cir. 1981), *cert. denied*, 457 U.S. 1136 (1982).

Thus, a defendant who conducts or participates in the conduct of a RICO enterprise's affairs through a pattern of racketeering activity *committed by others* has *not* violated §1962(c). Consequently, an agreement to do so — to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering committed by *others* — is *not* an illegal agreement, and therefore is not punishable under §1962(d). *See Dooley v. United Technologies Corp.*, *supra*, 803 F. Supp. at 440 (plaintiff cannot meet the "pattern of racketeering" requirement as to particular defendants "by pleading that [those] defendants agreed to the predicate acts . . . committed by other defendants"). *See also R.E. Davis Chemical Corp. v. Nalco Chemical Co.*, 757 F. Supp. 1499, 1509 (N.D. Ill. 1990).

Rather, only an agreement to violate §1962(c) — to conduct or participate in the conduct of the enterprise's affairs through a pattern of racketeering committed *by the specific defendant* — can satisfy the requirements of a §1962(d) conspiracy.

In fact, in *Elliott*, *supra*, which, as noted *ante*, at 6, has been described as the progenitor of the rationale underlying both sides of this issue, the Fifth Circuit explained that

> [t]he gravamen of the [RICO] conspiracy charge in this case is not that each defendant agreed to commit arson, to steal goods from interstate commerce, to obstruct justice, and to sell narcotics; rather *it is that each*

> *agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate crimes.*

571 F.2d at 902 (emphasis added).[2]

Subsequently, in *United States v. Phillips*, *supra*, the Fifth Circuit repeated that standard, finding that the defendant under consideration

> could be guilty of participating in a RICO conspiracy, even though the conspiracy had the single objective of importing the 200 pound load of marijuana, so long as he *committed or agreed to commit at least two separate crimes in furtherance of the conspiracy's single objective.*

664 F.2d at 1039 (emphasis added).

The court then applied that standard, and, since it ruled that there were *not* "two separate acts which [the defendant] agreed to do in furtherance of the conspiracy to import marijuana, there was no pattern of racketeering necessary for

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[2] In affirming the RICO conspiracy convictions in *Elliott*, the Fifth Circuit relied on that standard, noting that "[w]here, as here, the evidence establishes that each defendant, over a period of years, committed several acts of racketeering activity in furtherance of the enterprise's affairs, the inference of an agreement to do so is unmistakable." 571 F.2d at 903.

conviction in a RICO conspiracy[,]" it reversed the defendant's RICO conspiracy conviction. *Id. See also United States v. Martino*, 648 F.2d 367, 400 (5th Cir. 1981) (RICO conspiracy reversed because, as to one defendant, second predicate act committed by defendant was not charged in the Indictment).

The courts that have ruled otherwise, including the court below, have ignored that language in *Elliott* and *Phillips*, and eliminated the requirement that the defendant agree to commit personally two predicate acts of racketeering by simply noting that the language of §1962(c) does not require an agreement to commit personally the "pattern of racketeering activity". *See, e.g., Neapolitan*, 791 F.2d at 496 ("Congress did not explicitly impose through the language of the statute any requirement of agreement personally to commit two predicate acts").

However, that begs the question, since it is undisputed that its absence from the explicit language of §1962(c) notwithstanding, a substantive violation of §1962(c) requires that *the specific defendant* commit two predicate offenses constituting a "pattern of racketeering activity." *See* Sand, Siffert, Loughlin, and Reiss, *Modern Federal Jury Instructions*, Volume 3 (1996), at ¶ 52.04, Instruction 52-25, *supra; United States v. Leisure*, *supra*, 844 F.2d at 1367; *United States v. Phillips*, *supra*, 564 F.2d at 1038.[3]

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[3] In addition, as this Court's prior decisions addressing RICO demonstrate, the statute's provisions often require definition and clarification beyond what is expressly set forth therein. *See, e.g., Reves v. Ernst & Young*, 507 U.S. 170 (1993) [meaning of "conduct and participate . . . in the conduct of such enterprise's affairs" in §1962(c))]; *Holmes v. S.I.P.C.*, 503 U.S. 258 (1992) [meaning of "by reason of" in §1964(c) in determining standing to sue]; *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. 429 (1989)

The courts that have not required that a defendant agree to commit personally two predicate acts have not come to grips with the clear requirements of §1962(c), and how they are inextricably linked with §1962(d) conspiracies to violate §1962(c). Nor have those courts addressed the undeniable fact that §1962(c) requires the personal commission of two predicate acts even though the statute does not explicitly say so.

As a result, mere recitation of the language of §1962(c) does not support the contention that a RICO conspiracy can be established without proof of the particular defendant's agreement to commit personally two predicate offenses. In *United States v. Phillips*, *supra*, the Fifth Circuit recognized that connection, and, in affirming the district court's dismissal of the substantive RICO charge because the two predicate acts charged against the defendant merged into only one offense, remarked that "the district court did not discuss or explain why it did not [also] dismiss the conviction for conspiring to engage in a pattern of racketeering." 664 F.2d at 1038.

The misapplication of RICO by the court below, and concurrent misapprehension of a violation of §1962(c), are made clear from further review of the decision below, as well as of the decisions of the Circuits with which it concurred. For example, the court below asserts that "[t]o be guilty of a RICO violation, one must have violated other laws in a way that implicates RICO." 89 F.3d at 1197, *citing Neapolitan*, *supra*, 791 F.2d at 497 (quotation omitted). But it is the *personal* commission of predicate acts by the defendant, not by others, that establishes that defendant's "violation of other laws." By deleting that requirement, and permitting conviction for a RICO conspiracy without first requiring the defendant's agreement to

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[meaning of "pattern of racketeering activity" in §1961(5)].

commit personally the predicate acts -- which is the requisite "violation of other laws" in a RICO conspiracy charge -- the court below allows a RICO conspiracy conviction based on "violations of other laws" by persons other than the defendant.[4]

In addition, in finding conspiratorial liability without petitioner's agreement to commit personally two RICO "predicate acts," the court below mistakenly treated RICO "predicate acts" that comprise §1962(c)'s "pattern of racketeering activity" as *overt* acts essential to a conspiracy charged under 18 U.S.C. §371. 89 F.3d at 1196 ("to prove a RICO conspiracy, 'no actual acts of racketeering need occur; there need only exist a conspiracy to perform the necessary acts plus some overt action by one of the conspirators in furtherance of the conspiracy'"); *Sutherland*, *supra*, 656 F.2d at 1187.[5]

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[4] Since a §1962(c) allegation can include conspiracies as predicate acts, if a defendant agrees with another defendant that one of them will commit a particular predicate act, the non-acting defendant can be liable for that predicate act if it is charged as a conspiracy in the indictment, and the non-acting defendant is named in that predicate act. *See United States v. Brooklier*, 685 F.2d 1208, 1216 (9th Cir. 1982), *cert. denied*, 459 U.S. 1206 (1983). That, however, was not the case here.

[5] Some courts, including the Second Circuit, which for a RICO conspiracy requires the defendant's agreement to commit personally at least two predicate acts, have held that a RICO conspiracy may not even require an overt act. *See, e.g.*, *United States v. Tripp*, 782 F.2d 38, 41 (6th Cir.), *cert. denied*, 475 U.S. 1128 (1986) (RICO conspiracy "does not require proof of an overt act"); *United States v. Coia*, 719 F.2d 1120, 1124 (11th Cir. 1983); *United States v. Barton*, 647 F.2d 224, 237 (2d Cir.), *cert. denied*, 454 U.S. 857

RICO predicate acts, however, are surely not overt acts, as the distinctions are clear and dispositive:

- in a §371 conspiracy, at least one overt act must be committed, while not a single predicate act need be accomplished in a RICO conspiracy (the defendant need only agree to commit at least two);

- an overt act can be committed by any member of a §371 conspiracy, while a defendant must personally commit two predicate acts (that form a pattern) in order to commit a substantive violation of §1962(c);

- an overt act need not constitute a crime, while a predicate act must be an offense denominated in §1961(1);

- one overt act is sufficient for a §371 conspiracy, while two predicate acts are required for a substantive RICO or a RICO conspiracy.

Moreover, §1962(c) is *not* a conspiracy offense. Thus, the predicate acts are not overt acts. Instead, the "predicate acts" constitute an element of RICO that cannot be satisfied by *another* defendant's commission of predicate offenses.

The court below's confusion is understandable, considering the thorny issues RICO regularly presents to the courts. In fact, other courts have been similarly vexed by the same analytical defects. In *United States v. Carter*, 721 F.2d 1514 (11th Cir.), *cert. denied sub nom., Morris v. United States*,

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(1981).

469 U.S. 819 (1984), the Eleventh Circuit attempted to distinguish *Phillips*, *supra*, as follows:

> [a]s in *Phillips*, when a defendant's agreement does not include the objective of a RICO conspiracy, he must further agree to personally commit two predicate acts in order for RICO to apply. However, when a defendant agrees to become a member of a conspiracy with the essential RICO objective, further proof that the defendant agreed to *personally* commit two predicate acts is not required.

721 F.2d at 15310-31 (emphasis in original).

That unnecessarily convoluted and unworkable doctrine would present to a jury alternative definitions of conspiracy in the RICO context, which the court justified by stating that RICO "expanded traditional conspiracy law". 721 F.2d at 1530. Nevertheless, the Seventh Circuit, in *Neapolitan*, *supra*, placed its primary reliance on *Carter* even though in *Neapolitan* the court concluded that §1962(d) "does not mandate a new concept of conspiracy[.]" 791 F.2d at 497.

That inconsistency in the approach to RICO conspiracy jurisprudence is not confined to the courts. Indeed, extraordinarily, in *United States v. Winter*, *supra*, a full decade after RICO was enacted, the *government* urged the very position petitioner assumes here, that

> a RICO conspiracy be

> established by proof that each defendant agreed to commit personally two or more predicate crimes constituting a pattern of racketeering activity.

663 F.2d at 1136. *See also Adams v. United States*, *supra*, 474 U.S. at 971.

Moreover, even five years later, in 1985, a United States Department of Justice Manual entitled *Racketeer Influenced and Corrupt Organizations (RICO): A Manual for Federal Prosecutors*, instructed that "[a]s of mid-1985, it is the policy of the Organized Crime and Racketeering Section that every defendant in a proposed RICO conspiracy count must be shown to have agreed personally to commit two or more racketeering acts." *See Neapolitan*, *supra*, 791 F.2d at 494-95.

In fact, the Indictment charged the RICO conspiracy in that very fashion, and in that light, the proof was plainly insufficient. Indeed, this case provides a vivid illustration why RICO conspiracy liability must be grounded in the defendant's agreement to commit personally at least two predicate acts. Petitioner was found guilty of a RICO conspiracy even though the jury found he committed only one predicate, and it may very well have found that he agreed to commit but one predicate act.

D. Not Requiring a Defendant's Agreement to Personally Commit the Predicate Offenses Undermines a Series of This Court's Decisions Interpreting RICO

The court below reached its decision with respect to liability under §§1962(c) & (d) without reference to a series of this Court's decisions applying and interpreting RICO. Yet the

court below's holding seriously undermines this Court's decisions with respect to the elements of a RICO violation.

1. The "Pattern of Racketeering" Element

For example, in *H.J. Inc. v. Northwestern Bell Telephone Company*, 429 U.S. 229 (1989), this Court held that a "pattern of racketeering activity" required proof that "the racketeering predicates are related, *and* that they amount to or pose a threat of continuing criminal activity." 492 U.S. at 239 (emphasis in original).

For purposes of substantive §1962(c) charges, an individual defendant's alleged "pattern of racketeering activity" is evaluated with reference only to those predicate acts charged against him. As a result, in the RICO conspiracy context, allowing the predicate acts of *others* to be included in the "pattern" equation effectively vitiates the limits *H.J. Inc.* imposed on a "pattern" and RICO liability for an individual defendant.

It would also deprive a reviewing court of knowledge of which predicate acts the jury relied upon in finding a pattern for a particular defendant, since the verdict sheet, like that used here, would not indicate what predicate acts a jury considered against a defendant not charged in those predicate acts.

In fact, in this case, in view of petitioner's acquittal (via Rule 29 and the jury's verdict) on two of the three predicate acts, it is likely that the jury found the pattern based on the predicate acts charged solely against petitioner's co-defendant. Yet it is impossible now to determine whether that "pattern" was sufficient, since there is not any indication which predicate acts were so considered.

2. *The "Operation or Management" Element*

In *Reves v. Ernst & Young*, 507 U.S. 170 (1993), this Court held that a defendant is not liable under §1962(c) unless he "participated in the operation or management of the enterprise itself." 507 U.S. at 180. In so doing, this Court defined "participate", as it appears in §1962(c), to mean "to take part in[,]" 507 U.S. at 177 (citation omitted), and rejected the argument that "almost any involvement in the affairs of an enterprise would satisfy the 'conduct or participate' requirement[]" of §1962(c). *Id.*

The court below's decision runs afoul of *Reves* because if RICO conspiracy liability can be predicated on racketeering acts committed by others, then non-actors and outsiders of the type *Reves* excluded from substantive liability under §1962(c) will be ensnared within §1962(d) if they merely agree that others should commit predicate acts.

The irreconcilable conflict between the decision below and the *Reves* "operation or management" test is illustrated by a passage from *United States v. Elliott*, *supra*, which decision, as noted *ante* at 6, has been used to uphold RICO conspiracy convictions that did not require a defendant's agreement to commit personally two predicate offenses. In affirming the RICO conspiracy convictions, the court in *Elliott* held that RICO applied to "insiders *and outsiders[,]*" including "those peripherally involved with the enterprise." 571 F.2d at 903 (emphasis in original). That interpretation cannot co-exist with *Reves*, yet the decision below here will allow it to flourish.

Since the penalties for a RICO conspiracy are the same as they are for a substantive RICO offense — in both civil and criminal RICO actions — *Reves* will fail to provide protection for those persons and entities this Court has held are not subject

to RICO liability. *See, e.g., United States v. Quintanilla*, 2 F.3d 1469, 1484 (7th Cir. 1993) (holding that *Reves* "operation or management" test does not apply to a RICO conspiracy charge).

Indeed, under the interpretation offered by the court below, plaintiffs and prosecutors will be encouraged to rely solely on RICO conspiracy and eschew the substantive claims so as to avoid the need to prove each defendant's personal involvement, either by agreement or commission, in the requisite predicate offenses. Thus, RICO conspiracy will have swallowed the statute, and created liability for persons who have not committed, or agreed to commit, a single predicate offense.[6]

3. *The "Enterprise" Element Independent of the "Pattern of Racketeering Activity"*

In *United States v. Turkette*, 452 U.S. 576 (1981), this Court held that "the 'enterprise' is not the 'pattern of

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[6] The concept of limiting RICO liability to those acts for which a defendant is *personally* responsible is also reflected in this Court's decision in *Holmes v. S.I.P.C.*, *supra*, in which, in limiting standing to sue under RICO to those plaintiffs whose injuries were proximately caused by the defendant's conduct, this Court stated:

> [h]ere we use "proximate cause" to label generically the judicial tools used to limit a person's responsibility for the consequences of that person's own acts.

503 U.S. at 268.

racketeering activity'; it is an entity separate and apart from the pattern of activity in which it engages." 452 U.S. at 583. This Court also explained that "[w]hile the proof used to establish these separate elements may in particular cases coalesce, proof of one does not necessarily establish the other." *Id.*

The court below's construction of the RICO statute will eliminate the careful distinction *Turkette* drew between the "enterprise" and the "pattern of racketeering activity". For purposes of a RICO conspiracy, proof of the "enterprise" and a defendant's employment by or association with it will be, effectively, all that is necessary to establish RICO conspiracy liability, since the inference of an "agreement" that others will commit predicate offenses will flow inexorably from the mere membership in the "enterprise".

In *United States v. Winter*, *supra*, the First Circuit recognized this danger in holding that a RICO conspiracy required proof that the individual defendant agreed to commit personally the requisite predicate acts:

> [r]equiring one to knowingly join an enterprise and agree to commit two or more predicate crimes provides sufficient protection to those who might otherwise be convicted through guilt by association.

663 F.2d at 1136.

That "guilt by association" — in the RICO context, the mere membership in an "enterprise" — constitutes a "status crime", which is impermissible. *See Robinson v. California*, 370 U.S. 660 (1962). Yet it is precisely what the Court below's

decision promotes for a statute that provides for severe sanctions in terms of imprisonment, forfeiture, and civil damages.[7]

Accordingly, it is respectfully submitted that the only way to preserve the meaning of RICO, and of §1962(c) in particular, that this Court has explicated in its decisions is to reverse the decision of the court below, and adopt the construction employed by the First, Second, and Tenth Circuits: that RICO conspiracy liability requires that the individual defendant agree to commit personally two or more predicate acts of racketeering.

II. AS APPLIED IN THIS CASE, 18 U.S.C. §666 IS AN UNCONSTITUTIONAL INTRUSION INTO LOCAL MATTERS, IN VIOLATION OF PRINCIPLES OF FEDERALISM EMBODIED IN THE TENTH AMENDMENT AND INHERENT IN THE STRUCTURE OF THE CONSTITUTION

It is respectfully submitted that for the reasons set forth in petitioner's Brief, and in both *United States v. Foley*, 73 F.3d 484 (2d Cir. 1996) and *United States v. Frega*, 933 F. Supp. 1536 (S.D. Cal. 1996), §666 does not apply to this case, in which the integrity of federal funds was not implicated. However, if §666 does, in fact, apply to the circumstances of this case, the statute is unconstitutional as applied.

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[7] While the court below also relies on RICO's "liberal construction" clause, 89 F.3d at 1197, this Court long ago put to rest the notion that "anything goes" with respect to an expansive approach to RICO actions. *See, e.g., Reves v. Ernst & Young*, *supra*; *Holmes v. S.I.P.C.*, *supra*; *H.J., Inc. v. Northwestern Bell Telephone Company*, *supra*.

This case raises an important constitutional issue: by "federalizing" local prisons and prison officials and employees due to the acceptance of more than $10,000 in federal money, does §666 violate fundamental principles of federalism protected by the Tenth Amendment and "the tacit postulates of the Constitution as a whole" [Tribe, *American Constitutional Law* §5-20, p. 379 (2d ed. 1988) ("Tribe"), *citing Nevada v. Hall*, 440 U.S. 410, 433 (1979) (Rehnquist, J., *dissenting*)], when the statute reaches conduct having nothing to do with the federal funds?[8]

The statute under which petitioner was convicted purports to exert federal control over federal funds disbursed by Congress, but in operation establishes a general police power in the government over a wide range of purely local activity. This case is a perfect example, since the activity prosecuted was unrelated to the integrity of the federal funds the local prison received pursuant to contract. As a result, the invocation of §666 in this case exceeded the proper role of the national government in a federal system.

The Constitution empowers Congress to "pay the Debts and provide for the common Defense and general Welfare of the United States." U.S. Const. art. I, §8. All powers not expressly delegated to Congress "are reserved to the States, respectively, or to the people." U.S. Const. amend. X. Because Congress's spending power is not broad enough to permit federal regulation through the criminal law of wholly local conduct unrelated to federal funds, §666 violates the Tenth Amendment, at least as applied in this case.

Moreover, whether or not §666 exceeds Congress's

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[8] While many circuit cases have interpreted the statute, none have considered its constitutionality.

spending power, in this case the statute intruded so deeply into matters of such local concern with such little justification that its application here violated principles of federalism inherent in the structure of the Constitution itself, wholly apart from any particular textual language. *See* Tribe at §5-20, pp. 378-85.[8] Because the Constitution "presuppose[s] the existence of the states as entities independent of the national government," with their own spheres of authority and activity,

> [c]ongressional action which treats the states in a manner inconsistent with their constitutionally recognized independent status, therefore, should be void, not because it violates any specific constitutional provision or transgresses the explicit boundaries of any specific grant of authority, but because it would be contrary to the

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[8] Professor Tribe supports his point — i.e., that a particular statute can violate fundamental principles of federalism without violating particular textual language of the constitution — with, *inter alia*, *Fry v. United States*, 421 U.S. 542, 547 n. 7 (1975), in which the Court wrote that "[p]etitioners have stated their argument, *not in terms of the Commerce power*, but in terms of *the limitations on that power* imposed by the Tenth Amendment...The Amendment expressly declares the constitutional policy that Congress may not exercise power in a fashion that impairs the States's integrity or their ability to function effectively in a federal system." (Emphasis added). *See also Veazie Bank v. Fenno*, 75 U.S. 533, 541 (1869).

> *structural assumptions and the tacit postulates* of the Constitution as a whole.

Tribe at §5-20, p. 379 (emphasis added).

This Court has recently recognized that federal interests are circumscribed in those areas in which the states "historically have been sovereign" [*United States v. Lopez*, ___ U.S. ___, 115 S. Ct. 1624, 1632 (1995) (holding unconstitutional on commerce clause grounds federal statute prohibiting schoolyard possession of gun)]. This Court has also previously held that local prison administration is presumptively the province of state and local authorities. *See Jones v. North Carolina Prisoners' Union*, 433 U.S. 119, 126 (1977), *citing Procunier v. Martinez*, 405 U.S. 319, 321 (1972) (other citations omitted).

Here, the federal government unjustifiably invaded that sovereignty by invoking a statute that apparently permitted prosecution not only for entirely local conduct, but conduct that did not directly implicate federal funds at all. If §666 permitted the government's intrusion in this case, it violates fundamental principles of federalism.[9]

Certainly that is far afield of §666's intended purpose. The statute was enacted to protect federal funds administered directly through federal programs, since it was unclear at the

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[9] Like the statute invalidated in *Lopez*, §666 "contains no jurisdictional element which would ensure, through case-by-case inquiry, " that the charged conduct had an effect on the federal interest the statute seeks to protect. 115 S. Ct. at 1631. The $10,000 (funding) and $5,000 (value of the bribe) thresholds are not meaningful, considering the encompassing extent of current federal funding.

time whether 18 U.S.C. §201, the pre-existing federal bribery statute, reached the proscribed conduct once title to the funds was transferred to the program recipients. *See United States v. Foley*, *supra*, 73 F.3d at 489-90.

Notwithstanding that origin, the Circuit Courts have interpreted §666 as not requiring any link between the corrupt conduct and the federal benefits received by the affected agency. *See United States v. Coyne*, 4 F.3d 100, 108-10 (2d Cir. 1993); *United States v. Westmoreland*, 841 F.2d 572, 574-78 (5th Cir. 1988). The courts have found that through §666, "Congress seeks to preserve the integrity of federal funds by assuring the integrity of the organizations or agencies that receive them." *Westmoreland*, 841 F. 2d at 578. In other words, Congress apparently intended to permit the federal government to regulate all of the affairs of a local agency even when federal money is nowhere in sight.

That rationale, however, is subject to constitutional limits because federal funds are found now in every nook and cranny of society. Just as a Congressional finding that interstate commerce is affected "does not necessarily make it so[,]" *see Lopez*, *supra*, ___ U.S. at ___, 115 S. Ct. at 15, n. 2, this Court, and not Congress, has the last word as to how far federal jurisdiction can be extended under the guise of protecting federal funds.

In this instance, §666 has gone too far. *See United States v. Frega*, *supra*, 933 F. Supp. at 1540 (indictment charging §666 violation dismissed because the statute "upset[s] the balance of power between the federal and state governments"). This §666 prosecution represents an impermissible use of Congress's power to allocate federal tax dollars. The Spending Clause "confers only a power to spend; it confers no independent power to regulate." Tribe at §5-10, p.

322 [*citing United States v. Butler*, 297 U.S. 1, 62-78 (1936)]; *see also Linder v. United States*, 268 U.S. 5, 17-18 (1925). Consequently, when it provides funds to a local agency like a jail, Congress is constitutionally permitted to establish protections for those funds, but not to insinuate itself into any and all conduct committed in the local jail, as it did in this case.[10]

Punishing as federal felons local jail employees who come nowhere near federal funds (and probably did not know the jail's funding sources), and those who deal with such employees, is simply too attenuated from the purpose of §666 — protecting federal funds — to pass muster as a proper exercise of the spending power.

Certainly, an indirect threat to the integrity of federal funds can provide a basis for an exercise of Congress's

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[10] In an analogous context, the Supreme Court has held that while Congress may exercise its spending power to prohibit a recipient of federal funds from using those funds for particular purposes, the Spending Clause does not allow Congress to regulate the constitutionally protected activities a recipient organization undertakes with funds derived from other sources. *See Rust v. Sullivan*, 500 U.S. 173, 197 (1991) (funding provisions which "place [] a condition on the *recipient* of the subsidy rather than on a particular program or service" are unconstitutional) (emphasis in original); *F.C.C. v. League of Women Voters*, 468 U.S. 364, 399-401 (1984). Just as the activities engaged in by an organization are beyond the regulatory reach of Congress when federal funds are not used to finance those activities, so too is conduct that affects a local agency beyond the federal government's criminal jurisdiction when federal funds are not touched by that conduct

Spending Clause jurisdiction.[11] In petitioner's case, however, the connection between the charged conduct and federal funds was non-existent. To the extent petitioner's conduct comes within the coverage of the statute despite the lack of any nexus between his conduct and a legitimate federal interest, the statute offends constitutional principles of federalism.

Because §666 purports to reach purely local conduct having no connection with federal funds, it lacks such a jurisdictional basis, and is therefore unconstitutional as applied here. Accordingly, it is respectfully submitted that petitioner's conviction should be reversed.

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[11] *See, e.g., United States v. Dransfield*, 913 F. Supp. 702, 707-11 (E.D.N.Y.), *aff'd*, 104 F.3d 350 (2d Cir. 1996) (§666 reaches corrupt conduct affecting federal funds directly administered by local agency).

CONCLUSION

Accordingly, for the reasons set forth above, as well as for those set forth in Petitioner's Brief, it is respectfully submitted that petitioner's convictions for RICO conspiracy, and for violating 18 U.S.C. §666, should be reversed.

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